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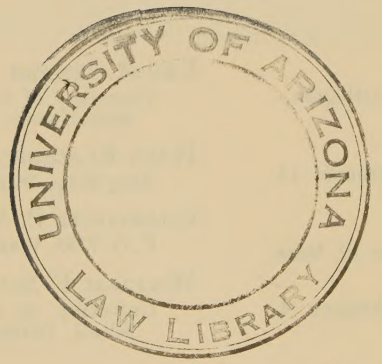

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CHAIRMAN'S PAGE

I am deeply grateful for the privilege of serving as your Chairman for the coming year. However, the inception of my service furnishes me with reason for expressing a gratitude that goes beyond my personal feelings. The Section of Administrative Law, in selecting a government lawyer as its Chairman for the first time, has furnished a signal example of the partnership that exists between members of the bar in private practice and members in government service in the common task of insuring justice for all. There are no antagonistic interests that can mar or impede this quest.

The Section of Administrative Law is important both to private practitioners and to government lawyers. The opportunities it provides for exchange of views and for ventilation of problems of common interest are of incalculable value to both groups. But the work of the Section has a special value for those who serve the government. The devoted study and the informed, constructive criticism of this Section have materially assisted the regulatory agencies in making voluntary improvements in the administrative process.

After reflecting upon the last sentence, I am inclined to strike the word "voluntary."

My reasons are as follows: If improvement in administrative process is necessary and can be supplied from within, it is anything but *voluntary;* if improvement is possible and necessary, we should look upon it as *compulsory* from within rather than voluntary. We all have a continuing obligation to make all possible improvements in the administrative process.

The need for improvement from within is particularly marked in an era where sweeping general changes are constantly proposed, changes that in the opinion of many thoughtful persons would emasculate the regulatory agencies in the process of eliminating isolated defects.

Adaptation to changing public needs and conditions is the essence of the administrative process. Its flexibility and capability of improving itself constitute its most precious assets.

I have no magic formula or program for correcting whatever

shortcomings there be in the administrative process. However, I suggest that the agency heads, their staffs, those who practice before the administrative agencies and the organized bar should make a common and determined effort more diligently to explore the possibilities of voluntary self-improvement of the administrative process. Surely any lawyer is familiar enough with administrative law to realize that there exist basic differences in duties, in needs, in practices and procedures among the fifty-odd Federal administrative agencies. Any legislation providing for too much uniformity is apt to defeat its purpose, to place the administrative process in a strait-jacket and thus ultimately destroy its usefulness.

As I see it, the most serious problem confronting the administrative process is our perennial enemy, delay. This enemy is not the exclusive property of the administrative agencies. As we all know, responsible officials are sorely troubled by existing delays in the courts.

While I have no sympathy for unnecessary delay, I believe we must proceed cautiously in this area. We must aim not only at expediting *decision,* but at *expediting justice.* All cases could, of course, be decided quickly by Police State techniques. Hence, our goal is not speed alone. Some cases by their very nature, require lengthy proceedings. And length alone is not necessarily an indication of delay. Interested parties must be afforded an opportunity to be heard. The time there involved is the price we pay for liberty and justice.

If there is any unnecessary delay in the administrative process today, the remedy clearly should come from within. The administrative process has the capability and must improve itself by finding new or improved methods to complete its task with proper speed. In many areas this has been done.

At my own agency, the Federal Trade Commission, we have in the past few years more than cut in half, all along the line, time consumed in all our procedures. I have no doubt that further improvements can and will be made. In this task we are receiving the benefit of the advice of practitioners as familiar with our procedural problems as we are ourselves and just as interested in making the administrative process work successfully and efficiently at the Federal Trade Commission. I am convinced that this same technique of cooperation in self-improvement of the administrative process can be made to work successfully in every agency, with a spirit of good will and give-and-take on the part of those who sit on opposite sides of the counsel table, and at the head of the table.

I conclude by suggesting that the administrative process has exhibited growing pains and failings just as the courts have done. However, throughout the years there has been a steady improvement in character, in responsibility, and in value of the administrative process. All of us, no matter what our connection with the administrative process, must assume a measure of responsibility to insure that this steady improvement continues.

Finally, a few words about the Section's organization and work for this year. Elsewhere in the Bulletin are listed the names of Chairmen and Vice-Chairmen of the various committees. We expect these officers fully to discharge their responsibilities in each instance, for a non-working, supernumerary committee is an affront to our 2,000 dues paying members, including many who willingly would assume such leadership. More than that, we expect each member of each committee to discharge his responsibility. Several hundred of you have expressed committee preferences; I have honored every request, to the best of my knowledge. If your committee stagnates, please write your Chairman and Vice-Chairmen, but send me an information copy of your letter.

There is critical and essential work for all of us in this Section. Ours is the task of studying and improving the procedures of the "fourth branch" of government, State and Federal. The task is huge and as never-ending as the ageless evolution of the law.

EARL W. KINTNER, *Chairman*

THE PROBLEM OF COMPLEXITIES AND DELAYS IN ADMINISTRATIVE PROCEEDINGS AND PRACTICE

By Dante B. Fascell

Member of Congress from the Fourth District of Florida

The Interstate Commerce Commission came into being in 1887 amid considerable confusion as to how the administrative process would operate and under what rules and regulations it would function. This was probably the real beginning of Administrative Procedure in this country. Since that time, this system has had a tremendously expanded impact on our people. Today we are faced with the fact that many legislative and adjudicatory powers have in great part been shifted to administrative agencies. In fact, in many of the agencies we find all three powers of government combined.

Some perspective on how extensive this administrative system has become can be obtained from the colloquy of that distinguished constitutional lawyer, U. S. Senator O'Mahoney, who during a debate said:

> "Mr. President, I hold in my hand a volume of U. S. Statutes at Large. This volume contains every public law enacted by the Congress of the United States in the first session of the 85th Congress in 1957—one volume. This volume, excluding the index at the back, contains 649 pages on which the laws are printed . . .
>
> "Now I am going to demonstrate what is enacted by Executive Order. I have in my hand part 4 of volume 22 of the Federal Register containing a portion of the Executive Orders and regulations issued by the President and various departments of Government. This is only one volume.
>
> "Let me have another volume, Mr. O'Callaghan.
>
> "And let me have another one.
>
> "I am not a juggler, but there are some jugglers with the laws of the United States now operating in the Government of the United States.
>
> "Let me have another volume, Mr. O'Callaghan.
>
> "I do not want to fall carrying the volume, so hold it for a moment.
>
> "There are 1, 2, 3, 4, 5 volumes, each one of which is at least 3 times as large as the volume containing the public laws of the

> Congress. . . . These are six volumes of the Federal Register, containing the Executive Orders of the President of the United States, and the regulations of the departments of Government, which have the force and effect of law." (Congressional Record, June 16, 1959, p. 9939.)

My five years in Congress have proved to me that this condition is very serious. The recent revelation by congressional committees and the subsequent judicial reversals of administrative decisions have shocked the conscience of the American people and the American Bar. The integrity and competency of the Administrative Process is being severely questioned in many quarters.

Who is responsible for this deplorable situation? First, the primary responsibility rests with Congress because *all* the executive, administrative, and regulatory agencies were created by statute. Second, Congress delegated to these agencies, by statute, too much authority and discretion. Third, Congress has never established the necessary machinery or method by which Congress could check up or oversee the wisdom and policy behind the rules, regulations and orders promulgated by administrative officials.

The legislation establishing these agencies was passed in general terms leaving wide areas of policy and discretion to administrative officials. This permitted administrative officials to fill up the gaps by rules, regulations and orders of their own making. Such rules, regulations and orders generally have the force and effect of law.

Such supervision as might have been exercised by the courts concerning these "rules, regulations and orders" has been thwarted by the courts through a policy which is self-imposed. The courts have erected an obstacle course in which there are all sorts of procedural and technical hurdles to judicial review. When and if review is finally had, the courts themselves have virtually given recognition to the finality of administrative judgments on the facts of a proceeding. Thus, I must conclude that the administrative officials have been given very large discretion and left to roam at large free from congressional review and practically insulated from judicial correction. This is the condition which exists today in a country where the people believe and boast that ours "is a government of laws and not of men."

Even where the law is clear and unambiguous, attempts have been made to modify the law by the issuance of a directive, rule or regulation. The Departments of Defense, Air Force and Navy have done this during the past year by their construction of the

Budget and Accounting Act of 1921, as amended. The cases were well documented by the House Government Information Subcommittee (see Hearings, Part 16 and 17; House Report 234, 86th Cong., 1st Sess.).

Members of the American Bar Association will recall the chaotic condition of our court system shortly after the turn of the century when the people were demanding a recall of judges and their decisions. Our court system was saved largely through the efforts of the American Bar Association in the promulgation and support of the Federal Rules of Civil and Criminal Procedure which were adopted and enacted into law by the Congress. When the new rules went into effect many members of the Bar felt that they would have great difficulty living with them, but the great harm which was suggested has not as yet materialized and they have been in operation for 20 years.

When did the first storm signal appear on the horizon with respect to the administrative process? In 1929, Senator Norris introduced a bill to provide for a separate administrative court. In 1936, Senator Logan introduced another bill to establish a Federal Administrative Court. The ABA endorsed these proposals—in principle—but did not approve any specific bill. In 1937, the ABA shifted its position and concentrated on steps to improve administrative procedure. Finally, and in great measure, due to the efforts of the ABA, Congress, in 1946, enacted "The Administrative Procedure Act."

The intent and purpose of that Act was to attempt to establish *uniform* rules and methods of procedures. When the Act was passed many lawyers both in the government and outside felt it would put the agencies in an impossible administrative position. I suppose many today still feel the same way about uniformity or even an attempt at it, because after 13 years we are still basically in the talking stage.

The Honorable E. Barrett Prettyman, Judge, U. S. Court of Appeals for the District of Columbia Circuit, in his testimony before the House Government Operations Subcommittee on Executive and Legislative Reorganization in February, 1958, laid bare a most vexing problem:

> ". . . the Judicial Conference of the United States became concerned about the length of time, cost and delay and volumes of records in a number of classes of cases, including antitrust laws and similar cases, which arose in the courts and also cases arising in the regulatory agencies."

To deal with mounting administrative procedure problems, Judge Prettyman indicated that the idea of a President's conference on administrative procedure really began in 1949. However, the President's conference was not organized until March 24, 1953 when the President issued his call for the conference to all executive departments and administrative agencies. The members of this conference consisted of distinguished judges, government officials, lawyers in private practice and trial examiners. This conference filed its report and recommendations with the President in March of 1955.

Contemporaneously, the Second Hoover Commission was studying Administrative Procedure and filed its report in the spring of 1955.

Both of these reports were exhaustively studied by committees of the ABA and the Administrative Law Section filed its report on Administrative Procedure with the House of Delegates in February, 1956. Subsequently, these recommendations were reduced by the Administrative Law Section into specific legislative proposals and introduced in Congress.

We have had much study and I am sure we will probably have much more, yet we don't have uniform rules. What about the cost, delay, confusion and difficulty encountered by the public? How long must this continue? Is there official resistance to change and improvement? What can and is being done about the situation? I hope all these questions and others will be promptly and satisfactorily answered.

In December, 1957, the Dawson Subcommittee on Executive and Legislative Reorganization published agency responses to the Committee's questionnaire on Administrative Procedure. Both Congressman Dawson and I note with satisfaction that the Administrative Law Section of the ABA is in the process of analyzing these responses. This gigantic task completed by the Dawson Committee and the ABA should, together with other available material, signal an end to any further studies on the problems incident to administrative practice and procedure. I believe that an analysis of the agency responses will reveal that no reference was made by the agencies to the recommendations of the President's conference. The situation is evidently becoming serious in the administrative practice field when recommendations of a President's conference are ignored. We are ready for some step-by-step practical solutions.

Judge Prettyman testified further before the Dawson subcommittee that the President's conference—

> ". . . said it was possible to have uniform rules on these subjects, by way of illustration; computation of time, the service of process, subpoenas, depositions and interrogatories, and admissions of record in proceedings involving numerous parties, the form and content of decisions, and appeals from intermediate decisions."

In my opinion, the unfortunate and chaotic situation which exists today is not due to any failure of the American Bar Association or the Administrative Law Section in particular. Your organization has been successful in having two major legislative proposals introduced in the Congress.

During the 85th Congress, S. 932 was introduced by Senator Hennings of the Senate Constitutional Rights Subcommittee of Judiciary, and I introduced, at the request of the Bar Association, an identical bill, H.R. 3350, which was reintroduced in the 86th Congress as H.R. 7092.

S. 932 was reintroduced in the 86th Congress and is now known as S. 600 and was referred to Senator Carroll's subcommittee for legislative action.

During the 85th Congress, the views of 27 agencies and departments of the Federal Government were obtained and the comments from the agencies were published in a committee print entitled "Federal Administrative Practice Reorganization Act—A Summary and Compilation of Departmental and Agency Reports." This laid the foundation for hearings which were held by Senator Carroll's subcommittee on S. 600 on July 21, 22 and 23. The Carroll subcommittee, at the moment, is only concerned with Title I of S. 600, which is entitled "Office of Federal Administrative Practice." Further hearings are to be held at a later date.

During the 85th Congress, S. 4094 was introduced by Senator Ervin and Senator Butler. This is the ABA legislative proposal to recodify Chapter 19 of Title 5 of the United States Code entitled "Federal Administrative Procedure." This bill has now been reintroduced in the 86th Congress by the same Senators and is S. 1070 and it was referred to the Carroll subcommittee for legislative action.

Progress is slow and a great deal remains to be done. I wish to commend your Committee Members of the Administrative Law Section and the American Bar Association for the tremendous

work, interest and energy which has been made in this effort. I know how difficult it is for practicing attorneys to make this contribution of time and interest.

Yet the complexities of government generally, and the tremendous expanse of Administrative Practice and Procedure problems, require the perseverance, skill and knowledge with which lawyers are particularly equipped.

In the interest of preserving the integrity of our judicial system and the Bar and the public interest, lawyers have the primary and continuing responsibility for progress and improvement in this area. I urge you to continue your fine work. The ABA must continue to be the spearhead in this action. Improvements and changes will not automatically emanate from the Federal departments or the Congress. You are the focal, energizing force to get this job done.

THE NEW CRITIQUE OF THE REGULATORY AGENCY

By Louis J. Hector

Former Member Civil Aeronautics Board

Lawyers these days find themselves engaged in many different occupations. At its meetings in Miami, for instance, the ABA Administrative Law Section engaged in a management engineering project—trying to figure out how to get certain administrative jobs done with greater dispatch, wisdom and responsibility.

This is a project which it is particularly important for lawyers to handle. For the problem is much broader than mere efficiency; it is rather the problem of achieving simultaneously maximum speed, maximum effectiveness and maximum due process. Since this is a very delicate balance, and of vital concern to lawyers, we must tackle the job ourselves and learn what management engineering we need as we go along.

A good way to start a management survey is to take a typical transaction of the organization under study and trace it from beginning to end. This will often at one stroke show up most of the basic problems. Let me take, therefore, a recent case before the Civil Aeronautics Board—the *Seven States Area Investigation.*

The purpose of the investigation was to formulate a plan for Federally subsidized, local air service for the Dakotas, Nebraska, Iowa, Illinois, Wisconsin and Minnesota. By the mid '50's, railroad passenger service was being pulled out of this area at an alarming rate. Air service was supplied by the trunklines only to the larger cities. The smaller cities and towns faced a serious transportation crisis. On December 14, 1955, therefore, the Board ordered an investigation to develop a program for the area.

As a yardstick, let's see first how an executive agency, or business corporation, or military command would tackle such a planning job. First, they would block out the main features of the problem at the top echelon. Some basic policy decisions would be made. Then a project director or chief of staff would be put in charge, and he would assemble a group of specialists, divide up the research, and within a few months have most of the necessary facts. Various staff groups would process and systematize the data, call for

more information where it was needed, and pull together a program in conformity with the basic policies. As major problems arose they would be referred to the project director who would coordinate the working groups. If new policy problems developed they would be referred on up to the policy makers. As the project neared completion, the top echelon would become familiar with the details, and by the time the plan was finished, the staff, the project director and the policy makers would all be in agreement. Final approval would follow swiftly. A job such as the *Seven States Case* should take a year at most.

But the Civil Aeronautics Board didn't do it that way. We took three years.

The Board started by asking the communities, the air carriers and other groups for general statements of their desires. A large number of documents came in—161 in all. The processing of these took some time because it was all done by one man, the Hearing Examiner, but he was eventually able to recommend to the Board what proposals should be considered, and the Board on March 20, 1956, entered an order setting the scope of the proceeding.

The Board, however, didn't give the Examiner any Policy guidance at this time, or indeed for the next two years. They merely stated that the purpose of the investigation was "to review the local air service pattern in the area covered by the states involved and develop a sound pattern of service to meet the needs of the entire area."

It was not that Members of the Board did not have strong views on local service policies. But there was no custom of discussing general policy by the Board, and no machinery for conveying any such policy to the Examiner.

After the Board's order of March 20, there were some protests and objections, but by May 2, the Examiner was able to announce that hearings would commence on July 17 in Omaha.

The record in the *Seven States Case* is six feet two inches high and by now we have covered five inches. It is at this point that the record begins to swell rapidly, and the built-in inefficiency of the process begins to take hold.

One man, the Hearing Examiner, will henceforth do all the work with no personal assistance of any kind. For the next year and nine months, every fact, every statistic, every argument, every objection will go to him and to him alone. He is surrounded by

hundreds of lawyers, economists, statisticians, mayors, presidents of Chambers of Commerce and airline executives. But he cannot delegate any part of his job to anyone. He must personally listen to the witnesses for days on end, and then read for further months the mountain of written material they submit.

Even though most of the direct testimony was documentary the hearings in Omaha, and later in Washington, went on for twenty days. By this time there were almost a hundred parties, and one hundred and ninety-four witnesses testified. They introduced over a thousand exhibits which added another three feet and two inches to the record.

Many of the witnesses represented cities and towns which desired air service, but a number of these did not provide very much useful information. This was not really surprising, for neither the Board nor the Examiner had specified just what sort of information they wanted. In other words, the Board never went out and actively sought the facts; anyone who was interested just came in and brought whatever data he thought might be useful.

One party was the Bureau of Air Operations, a division of the Board, whose job it was to represent the general public interest. They participated actively in the case. It might be thought that the Bureau would consult with the Members of the Board whose job it is to formulate aviation policy in the public interest, but under the rules, this was forbidden.

The hearings finally concluded on October 5, 1956, and the Examiner then sat down all alone to work up a plan. By this time he had five and a half feet of pleadings, transcripts, exhibits, and briefs. It is small wonder that it took him another year and two months to finish the job, for he was still working all alone.

Finally on December 13, 1957, the Examiner's plan for air service appeared—two volumes totalling 658 pages.

Of course, nobody was completely satisfied, and almost everyone filed exceptions and briefs saying what they liked and what they did not like about the Examiner's report and why.

And now at last the five Members of the Board, who for two years had sat in complete isolation from the matter, entered the picture. They tried to read the Examiner's report, the exceptions, and the briefs, but since this was only one of many cases before the Board, since there were dozens of minor matters coming to their offices every day, since they spend a large part of their time in

Board meetings and hearings, it was hard to get around to all this reading.

The grand public climax of the case came with four days of oral argument before the Board late in February of 1958. First there were sixteen senators, twenty-two representatives, three governors, and one mayor who took up a lot of the first day. Then the airlines got their chance. They were desperately pressed for time, because each one of them had only thirty minutes to talk about the case, but they did their best. Then each town and city came on for ten minutes each—65 in all.

By 4:30 on the afternoon of the fourth day everyone was dazed from twenty-one hours and thirty-five minutes of steady talking, and the argument ended.

The Board met first to discuss the case a month later. They quickly decided that the Examiner had been too restrictive in his award of routes, and that the proposed route pattern would, therefore, have to be substantially revised. So the Board sat down and did a large part of the Examiner's job over again. In fifteen sessions totalling over thirty hours the Board drew up a new plan.

This was a difficult job because the Board Members could not make any use of the Board's technical staff. They were assisted only by the General Counsel's office. At one point, indeed, the Board considered sending the whole case back to the Examiner, but it was quickly realized that this might well delay the decision for another year. So the Members did the best they could and redrew the routes themselves.

By May 19, 1958, the Board had redone the plan and announced its general outlines in a press release. Then a special staff known as the "opinion-writers" set to work and prepared another long document—157 pages—explaining and justifying the Board's new plan. No Member of the Board participated in the drafting of this document although it purported to be a statement by the Board Members of their reasons for the decision. This document was finally published on December 8, 1958, with an order that the new service could commence 60 days later—well over three years after the need first became apparent.

Gentlemen, I think most of us agree that this kind of thing can't go on much longer. If a private business tried to conduct its affairs this way it would go broke. If we tried to make our foreign policy or plan our national defense this way, we would still be a third rate power. And if we keep on trying to plan our national

transportation system this way, we will wake up in a national emergency one day and find that it won't do the job. Clearly these procedures must be over-hauled.

Let us try applying some of the basic principles of management engineering. One of these is that any man engaged in a job must have a clear and definite concept of what he is trying to accomplish. Objectives and policies will change, of course, but at any given moment, they should be clearly defined.

Now it is clear that the Examiner in the *Seven States Case* had only the remotest idea of what the Board wanted him to do. True he had some miscellaneous Board precedents to go on, but no real policies to guide him in the formulation of a major new local service plan. So he floundered around for two years formulating his own plan only to have the Board disagree with him on basic policy and do the whole job over.

Almost everyone who has ever examined the regulatory agencies has complained that they do not formulate clear policies. From the Attorney General's Committee in 1941 down through the Hoover Commissions, the complaint has steadily grown that every case before the agencies seems to be a new ball game with no general rules on which anyone can depend. As the Task Force of the First Hoover Commission said:

> Without accepted standards, the commission must analyze and evaluate relevant factors afresh for each new case; the staff and the industry are handicapped in presenting helpful data, arguments, or analysis; and the agency often appears to act in an unfair or arbitrary manner. All these factors argue for the establishment of standards of action as rapidly as possible.

I think we must all frankly admit that we have still not done this job. Of course, nobody likes to make general policy or formulate general standards. It is much easier to decide individual cases than to promulgate general rules which you are willing to live with in the future. Then too, men engaged in any form of judicial activity, have a historic reluctance to enunciate broad general rules for fear that they will tie their hands in future cases. But the whole justification of the classic administrative agency is that it can successfully combine policy-making and adjudication.

We all do a pretty good job, of course, on our procedural regulations and on regulations dealing with technicalities such as inspections and accounting reports. But on the matters that really count, such as licensing and all the host of problems involved in

rate regulation, the agencies have from the beginning preferred to stay in a sort of pragmatic flux where every case stands on its own feet. And the criticism has continued to grow.

There is another important management engineering principle dealing with policies: Almost any policy or plan, no matter how general, is a part of a larger policy or plan. Thus, in the *Seven States Case,* one must assume that the plan for new subsidized air service was somehow coordinated into an overall transportation policy under which this was deemed preferable to continuing the rail service at a loss. One must assume also that the increased subsidy bill was a part of the over-all budget and fiscal plan of the President. These assumptions are quite incorrect. The Board acted completely independently—without coordination with anyone. This is another characteristic of the administrative agencies which is today being closely questioned.

Let's take a somewhat different principle of management engineering and apply it to the *Seven States Case*—the principle that after a man is told what his objectives are, he must be given the necessary tools to achieve them.

One thing that strikes us immediately in the *Seven States Case* is that the Examiner was brutally short-handed. I am convinced that if our Examiners are to perform any function other than keeping order at hearings, they must be given a great deal more assistance. Except in the most unusual circumstances, the Examiner is the only man who ever really knows the record. While he must be given clear and definite policies and objectives from the commission which he serves, I believe that the commissions in turn must place greater reliance on his factual findings. That being the case, we have no alternative but to give our Examiners the greatly increased measure of assistance they need to do a more thorough and efficient job.

Let us apply just one more management principle to the *Seven States Case,* one first enunciated by Vilfredo Pareto, the Italian economist. It is stated with a succinctness which we lawyers can well emulate: "In any series of elements, a selected small fraction, in terms of numbers of elements, always accounts for a large fraction, in terms of effect." In other words: If you can find the main cause of a difficulty you don't have to worry about the other causes; if you can't find the main cause, then you can worry about the other causes forever without accomplishing anything.

I certainly don't purport here to isolate the main cause of our

administrative difficulties, but one thing seems clear about the *Seven States Case:* There was not too little judicial process here, there was too much.

The Federal Government does not decide on the location of flood control projects, post offices or highways, or select intercontinental ballistic missiles, or determine the parity price of cotton by means of an adversary judicial proceeding conducted with all the trappings of witnesses, cross-examination, exhibits, etc., and by placing the chief burden for the entire project on one man with no assistance of any kind. Why then do we feel that this is the right way to decide what cities should receive subsidized air service.

The only critically controverted problem in this case was which subsidized, local service carriers were to get which routes—a licensing problem. Possibly even that need not be litigated. We do not let Federal contracts for highways or submarines by holding a trial. But even assuming, as I personally do, that in contested license applications, full due process and judicial procedures are required, certainly a great many irrelevant aspects of these could be eliminated, and then the agencies could concentrate with full judicial process on the basic issues in controversy.

The agencies have worked themselves into an odd position in recent years. Under a steady barrage of criticism, they have tried to judicialize larger and larger areas of their work. The paradoxical result has been not a greater amount of real judicial process but a lesser amount—more judicial trappings perhaps but less of substance.

Here one more principle of management engineering comes into play—the managerial counterpart of Gresham's law: "Bad administrative practices drive out good." As an organization tries to give the appearance of full judicial procedure in every matter, both big and small, inevitable compromises and subterfuges are required to get all the work done. These compromises inevitably spread throughout the organization and in the long run, there is less true judicial process in any matter, big or small.

In regulating any industry, there are only a few major controls which the Government need apply with great care and precision, in order to achieve the over-all control required in the public interest. If the agencies could devote themselves to formulating clear policies in critical areas such as competition, licensing, selection between competing applicants, and the many facets of rate-

regulation, and devote themselves to the judicial application of these policies in critical cases, everything else could be delegated or even forgotten about. But as the Smather's subcommittee on surface transportation said last year:

> Over a period of many years regulatory commissions, like individuals dealing with controversial issues, tend to form habits of belaboring relatively unimportant details involving form rather than substance, while procrastinating on coming to grips with important policy matters that involve serious matters of public interest.

So much for the *Seven States Case*. There are clearly many changes and improvements indicated in the administrative process.

Now we must face the growing body of opinion that these changes and improvements will never take place within the existing agencies. And this brings me to the "New Critique of the Regulatory Agency." By this I mean the belief in many quarters that the combination of rule-making, policy formulation, planning, administration, adjudication, investigation and prosecution in one agency simply does not work.

Your immediate reaction will be that there is nothing new about this. This is just the same old stuff we have been hearing for thirty years—ever since Lord Hewart wrote "The New Despotism" in 1929. Gentlemen, I assure you that it is something different. It is a new set of ideas, held by a new group of people, for new and different reasons.

The struggle over the administrative agencies during the first half of this century was a Constitutional battle and a battle against government regulation *per se*. You all know the weapons that were used: The headlines "fourth branch of the government"; "the sacred tripartite system"; "separation of powers"; "excessive delegation of legislative authority"; "legislator, prosecutor, judge, and jury all rolled up in one"; "Star Chamber procedures." You all remember the defense: Our government and our economy is growing ever more complex. The legislature is not equipped to make detailed policy; the courts are not equipped to make expert or consistent policy. We must provide on a practical basis for the solution of the problems of our Democracy as they arise.

And you know which side won. Every time I look up and see the four splendid volumes of Kenneth Culp Davis's "Treatise on Administrative Law," I think to myself, "There is the victory

monument of the pragmatic school of administrative law." The Constitutional literalists have been completely routed.

What then is this flank attack which I have called the "New Critique?" Let me quote you part of a letter I received recently from the Dean of a great law school:

> I have been wondering whether the adjudicatory side of the administrative process could in any way be separated from the executive-policy making functions. In your view is the decision about who gets a license an inseparable part of the work of deciding air policy? I'm inclined to think the licensing function will never be properly performed until the licensors have life tenure, like federal judges.

Gentlemen, this is not a lone survivor from the defeated armies of the '30's. This is a young man, a liberal and a former active participant in Federal administration.

Last spring I gave a talk on the administrative agencies at one of our foremost liberal arts colleges. I surveyed the problems of the present agencies and how they might be solved. The reaction from the economics and political science faculty was startling. Many of them were old friends, and they spoke with great candor. In effect what they said was this: "Why don't administrators realize that one man can never do all these different jobs properly at the same time. Most of the inefficiency, the delays and the ethical problems of the agencies result from the fact that they are each trying to do a number of jobs which should be split up among several agencies."

These are straws in the wind. These are a small sample of countless expressions of opinion, many of them from men with experience in government who have thought long and hard about the problems of administration.

The critique bears little relation to the old anti-administrative crusade. It doesn't mention the Constitution or Montesquieu. It doesn't protest delegation of powers. It accepts the inevitability of extensive government control of business. It meets the defenders of the administrative agencies right on their own ground—the battlefield of pragmatic justification—saying, in effect, we don't care if these agencies are Constitutional or not; the important thing is that, as a practical matter, they just don't work.

If you had to summarize the Davis Treatise in one sentence it would go something like this: "Since the effective conduct of the complicated business of government today requires the concentration of powers in administrative agencies, the courts should, and as

a matter of fact have generally approved the work of the agencies." For the first half of the century, the critics of the agencies attacked the minor premise of this proposition—that the courts should approve the work of the agencies. Now the critics are attacking the major premise—that such agencies do, in fact, handle the business of government effectively.

What are the arguments? First of all, many scholars have now traced through in detail cases like the *Seven States Investigation,* which is typical, as you all know, of hundreds of agency proceedings. Many of them feel that this kind of thing just can't continue on, not so much because of the wear and tear on the litigants, but because of the patent incapacity of the process to accomplish the business of government.

Another argument is the one used by Don Beelar that a man can't be an administrator on Monday, Wednesday, and Friday and a judge on Tuesday and Thursday; that you can't deal with the same group of people and the same set of problems year in and year out, part of the time engaged in exploratory, informal conversation on general policy matters and problems which are still not in litigation, and then suddenly when a proceeding starts, climb up on the bench, wipe all the personal relations and informal conversations out of your mind and turn into a judge.

Administrators and judges have such completely different codes of ethics that a commissioner who tries to act like a judge is accused of trying to regulate in an ivory tower, while one who tries to act like an administrator is accused of becoming too friendly with the litigants.

So you get a kind of institutional schizophrenia, it is said, where men try to carry out duties and live by standards which are basically incompatible, and end up in a sort of amorphous procedural mish-mash which gets neither the administrative, the policy-making, nor the judicial job done properly.

The most devastating attack of all is: The administrative agencies are not responsible to the will of the people or for that matter to the will of anybody. As one commentator put it recently: "They are not independent, they're just irresponsible"—which I like to think referred not the character of the commissioners but to the fact that in truth we do not report to anybody. The decisions of the agencies are so technical that only a few people understand them. Congress steps in only intermittently and then usually in specific cases. The courts have little control because of our

"expertise." The President under present thinking is not supposed to exert any influence at all. How can we expect then, it is asked, to have the kind of coordinated national transportation policy or national economic policy that the public interest and the national defense require.

All the critics agree, I think, that adjudication must be performed by men occupying basically the position of judges, and that the Executive and Congress must keep their hands off. But policy-making is a different thing. This should be made by the Executive, it is increasingly felt, within the broad policy determinations of Congress.

The remedy proposed by the new critique is quite simple and familiar: Give to the Executive the functions of rule-making, policy formulation, planning and routine administration. Give to a special expert tribunal or group of tribunals the task of deciding major litigated cases and of hearing appeals from administrative decisions. If there is a job of prosecution, give it to a separate executive agency.

This, of course, is much like what the ABA has been working toward for many years. The Association now has some new allies who have approached the problem from a rather different point of view, but have come out in about the same place.

Let me close with one more general principle which is my favorite of all of those propounded by the management engineers. It is this: Improvement in any situation comes in one of two ways: 1) Numerous small changes in the old plan of operation or 2) a few basic changes and a new plan of operation. Most of our thinking about the regulatory agencies in recent years has centered about numerous small changes in the present plan of operation. Now it is being suggested that the time has come for a few basic changes and a new plan of operation. Whether we agree with such proposals or not, the administrative agencies and the friends of the administrative process, cannot resent them. After all, the administrative agencies as we know them today are the result of a few radical sweeping changes in government operations not so many years ago. Surely we cannot now in middle age object to others proposing new radical changes in government. We cannot stand as epigoni of the old order merely repeating the old battle-cries and saying that everything is just fine. We must face the many diverse proposals now in front of us, with the open minds, the realism, and the sense of dedicated responsibility which lie at the heart of all sound thinking about administration in the public interest.

HOW CAN UNDUE AND UNNECESSARY DELAY IN ADMINISTRATIVE PROCEEDINGS BE ELIMINATED?

THE ROLE OF THE HEARING EXAMINER IN AGENCY PROCEEDINGS

By Harold L. Russell

The hearing examiner has responsibility for a proceeding for 65 percent or more of the total time, assuming that the various procedural steps involve the following relative time values:

1. From original filing to assignment to the examiner and pretrial conference..... 5
2. From pretrial conference through exchange of written evidence and perhaps further pretrial conferences to hearing..... 25
3. The hearing itself..... 5
4. From hearing to briefs to the examiner..... 15
5. From briefs to examiner's initial decision..... 20
6. Exceptions, briefs and argument before the agency. 15
7. From argument to agency decision..... 15

You who are well acquainted with administrative proceedings will readily recognize that the values are somewhat arbitrary. The time lag from original filing to assignment for prehearing conference may be several years, and the other steps may require only months; and you have known cases in which the time between argument and agency decision was greater than required for all other procedural steps combined.

However, assuming that the agency itself is reasonably equipped to activate proceedings and decide them, it is not entirely arbitrary to say that the Examiner's responsibility covers at least 65 percent of the required time span. I should also confess that the assigned values represent something of a compromise of matters as they are and matters as perhaps they should be, with some emphasis on the latter.

It seems to me, also, that these time relationships are important because in attempting to judge delay, and whether it is unnecessary or undue, relative time requirements may be more significant

than absolute time requirements because of the tremendous substantive variations in proceedings.

The hearing examiner is a true middleman. He may have to reach out to get material for his mill; or push it off when he is overloaded. He may find that his product is given a quick, final processing at the agency level or he may find that slow final processing discourages him from grinding his grist more expeditiously and efficiently.

Either way, he may be pushing or pulling on either side; and he may be pushed or pulled on either side. And he is largely the only clerk of his court, the trier of fact, the monitor of the evidence, the developer of the record, the issuer of subpoenas, the compeller of production of evidence, the arbiter of stipulations, the finder of fact, the concluder of law and, from the standpoint of time, the most important single person in administrative proceedings.

Now we come to the important question, which is: What can the examiner do, theoretically and practically, to move a proceeding expeditiously during the 65 percent of the time when it is his responsibility.

Even the examiner's theoretical powers are limited.

And he must work in an atmosphere of uncertainty created by the fact that his decisions are subject to review and modification or reversal and the further fact that even though interlocutory appeals may be prohibited by rule, extraordinary appeals to the agency may be entertained.

He can attempt to have the parties agree upon well-defined issues but, because standards for decision may not be clear and precise, the only agreement on the issues often possible is one which covers the waterfront and is only a paraphrase of the ultimate statutory questions to be decided.

He can set dates for exchange of written evidence or hearing. But he must allow the parties "reasonable" time for preparation and he must judge what is reasonable by the representations of the parties. Usually he is compelled simply to compromise their positions.

He can attempt to limit the evidence to relevant and material matters, but lack of specificity in definition of the issues creates such doubt that almost anything goes into evidence.

He can cajole or wheedle, or occasionally require, the parties to present their evidence in writing, but he must allow "such cross-examination as may be required for a full and true disclosure of the facts."

Moving into the area of the hearing itself, we also find the examiner in a most difficult position.

He is expected to begin hearings promptly, to hold recesses to a rigid time schedule, to achieve the maximum use of the greatest number of minutes which can be reasonably crowded into a hearing day, and to control counsel or witnesses who are not responsive to the proprieties of proper respect, decorum and dispatch of business. I often wonder why examiners (and agency members) do not have contempt powers and respectfully suggest that such powers would appropriately contribute to the solution of the problems of delay. Even justices of the peace have contempt powers.

Assuming that he can, and does, require the presentation of evidence in writing, the designation of witnesses and subject matter to be covered by each advance of the hearing, he still must run the time-consuming hurdles of cross-examination, requests for further evidence, offers of proof, etc.

Too little analysis has been given the basic right and purpose of cross-examination, which often consumes as much as 90 percent of the actual hearing sessions. Although the days spent in the hearing itself may be relatively small, they are nevertheless the most expensive, not only because of the effort there expended but also because lengthy hearings mean lengthy records which, in turn, mean greater expense.

There is one elementary aspect of cross-examination which the examiner can control, however, though it may require heavy work. No *party* can be relied upon to make appropriate objections to confine cross-examination to the scope of the direct. If there is to be any effective restraint in that regard, it usually must come from the examiner.

The examiner may also appropriately require all requests for the production of evidence to be made prior to the hearing, and prohibit afterthought requests made upon the record during the hearing.

I have assumed the use of the pretrial, but I believe there should be more extensive effort at *repetitive* use of pretrial in the same proceeding, particularly on evidentiary matters.

The examiner may also require offers of proof to be submitted in writing, saving the time which would otherwise be required to make offers orally on the record.

I also suggest, with some hesitancy but with deliberate convic-

tion, that the examiner may and often should require counsel to submit to him in advance a memorandum of the scope, purpose and nature of any proposed cross-examination so that he may rule in advance as to its necessity for a "full and true disclosure of the facts."

Now the paucity of more specific and practical suggestions for shortening the hearing time should be as shocking to you as it is to me; and it does reflect a need for exchange of ideas in the realm of practical means, small perhaps in individual effect but large in cumulative effect, of shortening hearings.

The examiner's job through the hearing is rugged enough, but with the closing of the record and the filing of briefs, another back-breaking job begins. You know of monstrous records; they grow worse every day. I know of a pending unfinished case where there have already been 61 days of hearings, over 10,000 pages of transcript, some 60 pounds of written evidence (and, parenthetically, it should be noted that some 150 persons receive two copies so that there is already some 18,000 pounds, or nine tons, of "evidence"), and the case is only about 80 percent completed. It is disheartening to think of the examiner's having to review such a case, without legal, statistical or other analytical assistance.

The role of the hearing examiner generally ends with the issuance of his recommended or initial decision. However, I have never been convinced that, at that point, his unsurpassed knowledge of the pleadings and evidence should be thrown down the drain and that the agency members themselves should be denied the further advice of the best informed impartial person having comprehensive knowledge of the situation. That seems to be a waste of man hours which must cost millions of dollars in delay.

At least a few comments are appropriate here on what can be done to improve the examiner's position and assist him in eliminating unnecessary and undue delay. We can provide better standards for decision. We can eliminate interlocutory appeals, except with the examiner's permission. We can give him contempt powers. We can give him assistance, clerical, legal, statistical and analytical. We can raise his pay, a proposition to which this Section and the ABA are already committed. We can accord his decisions greater weight, something that would be automatic if he had more definite standards for decision, and on issues of credibility, where demeanor is important, his decisions should be final (but see *F.C.C. v. Allentown Broadcasting Corp.*, 349 U.S. 358, 75 S.Ct.

855 (1955); *cf. N.L.R.B. v. Local 160,* U.S.C.A. 7th Cir., June 25, 1959). Finally, on all fronts, we can promote respect for the office of hearing examiner to enable him better to perform those functions in which his effectiveness is so much dependent upon his ability to persuade.

I believe that the matter of personalities has too often influenced consideration of the position and function of the office of hearing examiner. I earnestly submit to you, however, that the problem is one that deserves our thought and action to provide for a period beyond the lives of any of us. The problem is to pass on to our children and grandchildren a system of administrative law which will insure just, fair and speedy action. We must remember that, if we do not bequeath such a system, our children and grandchildren may inherit a civilization where there may be the chaos of no system at all, or the cross of a completely autocratic system. And in our consideration of the problem, we must give major consideration to the role of the hearing examiner, which is so important in the process.

DISCOVERY IN ADMINISTRATIVE PROCEEDINGS

By Raoul Berger

The Administrative Procedure Act makes no express provision for pre-trial "discovery"; nor, so far as I could find, does any statute or regulation provide for "discovery" in an administrative proceeding.[1] It is singular that the administrative process, which has been in the forefront of the movement to liberalize pleading and evidence,[2] should lag behind the courts in the field of discovery. For the Federal Rules of Civil Procedure give an almost "unlimited right of discovery," [3] and it is generally agreed that these discovery provisions have

> "increased the efficiency of the administration of justice in the federal courts." [4]

In the recent words of Mr. Justice Douglas, discovery together with pre-trial procedures

> "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." [5]

Recently, too, Judge Irving R. Kaufman of the United States District Court for the Southern District of New York, addressing himself to the question whether administrative agencies have kept pace with modern court-developed techniques against delay,[6] underscored the role of pre-trial conferences in which counsel would "lay all of their cards on the table." But, stressed Judge Kaufman, pre-hearing conferences might falter because of the

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[1] For example, "There is no provision in the [Taft-Hartley] Act authorizing the use of the discovery procedure." National Labor Relations Board v. Globe Wireless, 193 F.(2d) 748, 751 (9th Cir. 1951).

[2] Davis, *Administrative Law Treatise,* p. 523 (1958); Rhodes Pharmacal Co. v. Federal Trade Commission, 208 F.(2d) 382, 387 (7th Cir. 1953).

[3] 4 Moore, *Fed. Prac.* 2025 (2d ed. 1950).

[4] Id. at p. 1014.

[5] United States v. Procter and Gamble Co., 356 U.S. 677, 682 (1958).

[6] Address before The Federal Trial Examiners Conference, Silver Spring, Md., May 7, 1959.

absence of "meaningful discovery procedures"; and he quoted Professor Davis for the proposition that

> "Probably no sound reason can be given for failure to extend to administrative adjudication the discovery procedures worked out for judicial proceedings." [7]

It is the purpose of this discussion to suggest an adaptation of judicial discovery procedures to administrative proceedings by resort to the existing deposition and subpena provisions of the APA, limiting discussion to the pre-trial obtention of evidence which is to be used at the hearing as distinguished from attempts to obtain evidentiary leads in a search for fresh evidence.

A random sampling indicates that a number of agencies provide for deposition taking upon a showing of "good cause," [8] and that some agencies require an explanation why it would not be practicable for witnesses to appear at the hearing.[9] Such provisions reflect former Equity Rule 47,[10] and fail to take account of the fact that in 1938 a greatly liberalized procedure supplanted the former restrictive practice. Rule 26 of the FRCP has provided for the use of depositions

> "for the purpose of discovery or for use as evidence in the action or for both purposes." [11]

In 1946, the APA, by § 7(b), authorized a hearing officer to

> "(4) take or cause depositions to be taken whenever the ends of justice would be served thereby."

Since the APA, like the Constitution, sought to rationalize a vast terrain in small compass, it could not pause to dwell upon minute

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[7] Davis, *Administrative Law Treatise,* p. 589 (1958).

[8] For example, Rule 12 of the Federal Trade Commission:

> "Good cause being shown, the testimony of any witness may be taken by deposition . . ." 15 U.S.C.A. 1958 Supp., p. 60.

See also Rule 102.30 of the National Labor Relations Board, 29 U.S.C.A. § 212 to end, App., p. 451 (1956); Interstate Commerce Commission Rule 57, 49 U.S.C.A. after § 1183 in App., p. 463 (1951).

[9] U.S. Atlantic & Gulf Puerto Rico Conference v. American Union Transport, 5 Pike & Fischer Ad. Law (2d) 622, 623 (Fed. Maritime Bd., 1955); Radio Station KRMD, Fed. Communications Commission, discussed in In re Allen, 8 Pike & Fischer Ad. Law (2d) 787, 789-790 (F.C.C., 1958); which explains that the F.C.C. "good cause" rule has been superseded.

[10] 4 Moore, *Fed. Prac.* 1027 (2d ed. 1950).

[11] Under the new practice, the testimony of any person, whether a party or not, can be taken before trial; and the "production of documents" can be compelled on the taking of a deposition. 4 Moore, *Fed. Prac.,* p. 1051 (2d ed. 1950).

procedural provisions such as were earlier expressed in the FRCP. Whether we look at the FRCP as expressive of a relevant policy,[12] or as a Congressional expression "when the matter has come to its attention" [13] which again should be given effect, or at "depositions" as a term of fixed meaning,[14] we may justifiably conclude that depositions may be employed under the APA as under the FRCP to ascertain what a witness will testify at the hearing and what documents he will rely on,[15] particularly when it is recalled that the APA is "to be given a 'hospitable' interpretation." [16]

This interpretation of the APA "deposition" provision gains strength when read in conjunction with the cognate § 6(b) provision for subpenas:

> "Agency subpenas authorized by law shall be issued to any party upon request . . ."

Presumably the phrase "authorized by law" refers to a law outside the APA, e.g., 15 U.S.C. section 49, which authorizes the Federal Trade Commission to

> "require by subpena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

A later paragraph empowers the Commission to

> "order testimony to be taken by deposition in any proceeding or investigation. . . . Any person may be compelled to appear

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[12] National City Bank v. Republic of China, 348 U.S. 356, 360 (1955).

[13] Harris v. Zion Savings B. & T. Co., 317 U.S. 447, 452 (1943).

[14] "where words are employed in an act which had at that time a well-known meaning in the law, they are used in that sense unless the context requires the contrary." Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 115 (1939).

While the § 7(b) words "whenever the ends of justice would be served thereby" are reminiscent of the old *dedimus potestam* formula "necessary to prevent a failure or delay of justice," they significantly substitute the broader "justice would be served." Whatever facilitates "a fair contest," to borrow the phrase of Mr. Justice Douglas, supra, serves the ends of justice.

[15] At least one agency, the Federal Communications Commission, permits a use of depositions that departs from the earlier restrictive practice. In In re Allen, 8 Pike & Fischer, Ad. Law (2d) 787, 790 (1958), a party was permitted to take a deposition in the course of a hearing of a witness who had already testified. The Hearing Examiner, relying on an earlier requirement of a showing that the witness "may not reasonably be expected to appear," p. 789, granted a motion to quash. The Commission reversed on the ground that the later rule grants "blanket permission" in place of the earlier "good cause" requirement. The FCC rule provides that

> "A party to a hearing desiring to take depositions of any person shall give reasonable notice . . ."

[16] Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955).

> and depose and to produce documentary evidence in the same manner. . . ."

as was earlier provided for investigations.[17] Thus section 49 expressly weds the use of a subpena to the taking of a deposition, an example followed in Rule 45 of the FRCP, whereunder a subpena may also be employed to compel "production of documents upon a deposition." *Bank of America etc. v. Loew's Internat. Corp.,* 18 F.R.D. 489, 490-1 (S.D.N.Y. 1956). By virtue of APA § 6(b) "any party" may resort to this subpena provision. A subpena duces tecum may command the production of records at an examination before trial, *403-411 East 65th St. Corp. v. Ford Motor Co.,* 27 F.Supp. 37 (S.D.N.Y. 1939). To be sure, a subpena merely commands that the specified material be brought into court, but usually the judge orally orders "its inspection and use." *United States ex rel Tilo Roofing Co. v. J. Slotnick Co.,* 3 F.R.D. 408 (Conn.) This practice can be embodied in a regulation patterned after Rule 17(c) of the Federal Rules of Criminal Procedure:

> "The court may direct that books, papers, documents and other objects designated [in subpenas] . . . be produced before the court at a time prior to the trial . . . and may . . . permit the books . . . to be inspected by the parties or their attorneys."

The making of regulations to "comply with the requirements of this Act" is authorized by § 12 of the APA, and additional reliance may be placed upon an agency's "inherent power to adopt and promulgate rules of procedure." [18] Given a statutory subpena power, it seems well within the agencies' procedural powers to set the time for production and inspection of records.

Do sections 6(b) and 7(c) of the APA authorize depositions to be taken from and subpenas to be issued against government officials? Nowhere do these sections purport to exempt the government from their provisions. The answer to a similar question under the general terms of the Federal Rules of Civil Procedure is that

> "The Government as a litigant is, of course, subject to the rules of discovery." [19]

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[17] Compare the SEC provision in 15 U.S.C. § 78u (c) for "requiring the attendance of witnesses and production of . . . records . . .". There are numerous statutes of similar import.

[18] American Fruit Growers v. S. T. Runzo Co., 95 F. Supp. 842, 845 (W.D. Pa. 1951); Philadelphia Elec. Power Co. v. Federal Power Commission, 156 F.(2d) 648, 649 (3d Cir. 1946); Ohio v. U.S. Civil Service Commission, 65 F. Supp. 776, 779 (S.D. Ohio 1946); Peninsula Corp. v. United States, 60 F. Supp. 174, 180 (D. Col. 1945).

[19] United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958). And see Berger

The legislative history of § 6(b) shows an intention to put private parties on a par with the government in the interest of fairness. The Senate Committee Report states that this provision is designed to

> "Assure that private parties as well as agencies shall have a right to such subpenas. This is an indispensable requisite to fair procedure since if the private party does not have the benefit of compulsory process he may not be able to secure witnesses or evidence while the agency can have such process for its own purpose." [20]

Today, almost all administrative agencies enjoy investigative powers, implemented by the subpena power, and in consequence are in a position to obtain before trial all of the records and documents which the adversary holds. Such one-sided "discovery" seems manifestly unfair, and violates the Supreme Court standard, i.e.,

> "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other [under the FRCP] to disgorge whatever facts he has in his possession." [21]

Considerations of fairness are fortified by the APA § 12 provision that

> "Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons."

It would therefore appear that subpenas and depositions are as freely available against as to the government.[22]

& Krash, *Government Immunity from Discovery*, 59 Yale L.J. 1451, 1454-5 (1950). In Kamen Soap Products v. United States, 110 F. Supp. 430 (Ct. Cl. 1953) 28 U.S.C., section 2503 provided for the issuance of "subpenas requiring the attendance of witnesses" and "the production of testimony"; and the government moved to quash a subpena duces tecum directed to it. Despite the fact that section 2507 expressly provides for "calls" on the departments for "any information or papers" and authorizes a department head to refuse compliance if in his opinion it will be "injurious to the public interest" the Court of Claims found no intention "to exempt the Government" (p. 434) from the general subpena provisions of section 2503.

[20] Sen. Doc. No. 248, 79th Cong. 2d Sess., p. 27. For parallel House Committee utterance, see id. at 206.

[21] Hickman v. Taylor, 329 U.S. 495, 507 (1947). Indeed "experience showed that it was the mutuality of discovery which was largely responsible for its success." 4 Moore, *Fed. Prac.* p. 1033 (2d ed., 1950).

[22] In Biazevitch v. Becker, 8 Pike & Fischer, Ad. Law (2d) 21 (U.S. D.C. S.D. Cal. 1958), an NLRB Trial Examiner had issued a subpena duces tecum to the Regional

Inasmuch as the legislative history of § 6(b) expressly states the intention to provide to private persons the "benefit of compulsory process," supra, it follows that a private party to an administrative proceeding is entitled to invoke judicial enforcement of a subpena. This, of course, turns on the provisions of the various agency statutory charters, in the case of the FTC, for example, according to the terms of 15 U.S.C. § 49. The provisions vary, e.g. the NLRB statute provides for enforcement in a proceeding instituted by the Board, supra note 22.[23] In such judicial enforcement proceedings, it would be open to the government as to a private person to demand the "showing of general relevance and reasonable scope of the evidence sought" as § 6(b) provides, and the government would have open to it the recognized defenses of evidentiary privilege, such as military information and the like.

The courts, said Judge Kaufman in May, 1959, met "the challenge of modern day litigation," and "we are all waiting to see whether the agencies can rise to the challenge." [24] He suggested an "adaptation of procedures already developed in the courts." A statutory framework already exists, if the foregoing analysis is valid, upon which such an adaptation can be hung. With the FRCP on the books, the Congress could safely assume that the agencies themselves, using their rule-making powers, would fill in the interstices of the APA by regulation. One of the glories of the administrative process has been its flexibility and inventiveness. Adaptation of judicial discovery to administrative proceedings calls not so much for inventiveness as for shaking off the shackles of inertia to borrow well-proven judicial tools.

Director, the Board Attorney and the Board Field Examiner for production of documents. The Examiner was reversed by the Board; the district court held that it was without jurisdiction to review because the Act confined review to the Circuit Court of Appeals, and because the statute left enforcement to a proceeding instituted by the Board, 29 U.S.C. § 161(2).

[23] The patently undesirable patchwork of enforcement proceedings which must flow from the varying statutory enforcement provisions would be cured in part by the provisions of Sec. 1006(b)(4) of the proposed American Bar Association revision of the APA, S. 1070, 86th Cong., 1st Sess. (1959); which authorizes the presiding officer to

> ". . . (4) permit or require depositions or discovery upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the proceeding . . ."

This provision might be strengthened by changing its permissive provisions to an unqualified right such as is conferred by FRCP Rule 26.

[24] An FTC Examiner rose to the challenge and granted discovery in the interests of "fairness" in In re Gulf Oil Corp., 8 Pike & Fischer Ad. Law (2d) 83 (1957 and 1958), and was sustained by the Commission. The case is discussed in Huard, *Federal Agency Decisions—1958,* 11 Ad. Law Bull. 213, 231 (1959)

THE DARK PHASE OF AGENCY LITIGATION

By Donald C. Beelar

In the vast reaches of the universe there is one area, comparatively nearby, about which we know very little. That area is the dark side of the moon. The moon manages its orbit so as to conceal its dark side from any earthly observations.

In that part of our vast government complex which we blithely call "the administrative process," there is a phase of agency litigation about which we know almost as little as we know about the dark side of the moon. This obscure phase of agency litigation occurs when the trial examiner's decision goes into the processing machinery for review and decision at the agency level. We know what goes into the review machinery and we know what eventually comes out. But what actually happens in between is pretty much a deep secret carefully guarded from public observation.

This discussion has to do with agency litigation, to the exclusion of all other agency functions. To illustrate, there are over 25,000 cases of adjudication now pending before 21 federal agencies. This is agency litigation. Unnecessary delay in this litigation activity is our subject. My part is the "Role of the Agency on Review," which I have restyled "The Dark Phase of Agency Litigation."

Agency litigation can be divided into four phases. *First,* the pleading phase which includes everything preceding the notice of hearing; *second,* the hearing phase which in a great majority of instances is conducted by trial examiners; *third,* is the phase where trial examiner decisions are put through the agency's review mill; and the *fourth* phase is judicial review. All phases of agency litigation are conducted in the open, except the third phase, agency review, where any one or a combination of a number of things may transpire, generally unbeknownst to one or more or all of the litigants. It is at this dark phase of agency litigation that internal or external forces may lurk and ambush a litigant without his knowing what happened.

There are three internal forces at work in the review phase: *first,* the agency staff; *second,* the agency member or members who will

decide the case; and, *third,* the trial examiner's decision which in this phase stands mute. No one should discount the internal maneuvering which may take place either at the staff level or at the agency level. These internal maneuvers may have more to do with the actual decision than anything in the hearing record. Here the examiner decision gets a going-over by the (a) cold record rewrite expert, and (b) agency staff people.

One prime cause of delay at this review phase is the work of the "cold record rewrite expert." There is a tendency to do a complete rewrite job on the examiner's decision. Here is where the talent of the "cold record rewrite expert" and Parkinson's First Law coincide to consume whatever time can be made available for the completion of this task. In this rewrite exercise the hearing record may be used not so much as a basis for arriving at a decision as to justify a decision otherwise previously made.

There is a strong tendency of agency staff people to take control of a case. This is contrary to the spirit and intent of the Administrative Procedure Act. For example, House Report No. 980 on Section 8 of the Administrative Procedure Act stated:

> "There are suspicions and good ground for assuming that those who purport to decide cases actually do not, that the submittals of private parties are not fully considered, that the views of agency personnel are emphasized without opportunity for private parties to meet them, and that matters outside the record are often the real grounds of decision."
>
> * * * * *
>
> "The provisions of section 8 are designed to make it certain that those who sign decisions or decision papers are actually the people responsible for them, that the evidence and the arguments of the private parties are fully and fairly considered, that the views of agency personnel are not unduly emphasized or secretly submitted, and that the official record alone is the basis of decision."

Unfortunately what Congress clearly intended in 1946 has not yet been realized in 1959. The legislative history of the Administrative Procedure Act, like the primrose path, is generously paved with good intentions. Staff in-fighting over the rewriting of examiner decisions causes delays most of which are unnecessary, even aside from the inherent unfairness of this behind-the-scenes activity.

An even more shocking menace lurks during the review phases

of agency litigation, namely, the attempt to maneuver agency decisions by external influence and pressure.

Agency litigation is conducted in political environment which invites ex parte attempts to influence the decision of pending cases. This exposure of agency litigation to political influence is the Achilles heel of the administrative process. Notorious instances of influence peddling and pressures have been brought to light, but to date we have no legislation to protect agency litigation from ex parte maneuvering. Even worse, some members of the Congress in commenting on S. 2374, recently have publicly asserted a privilege and intention to intercede in agency litigation. This condition is totally irreconcilable with justice and fair play.

Exposure to this ex parte maneuvering occurs during the dark phase of agency litigation. It is here that inquiry will be most productive to eliminate delays and much that violates fair play in agency litigation.

If we are to contribute anything to this discussion other than blunt criticism, we will need to come to some understanding on what function is intended by agency review of trial examiner decisions.

At the outset we are met by an insurmountable obstacle. There is no generally accepted agreement on the division of responsibilities between the trial examiner and the agency members. The heart of the problem is the gap between those who preside and those who decide. One view is that the presiding officer must be the deciding officer. The other view is that the agency members (and staff) retain their complete prerogative to decide the case as if they had tried it.

The end production of agency litigation is a trial decision. This is also the product of the trial examiner. The staff and agency processing of trial examiner decisions results in a second complete trial decision. In this situation what we have in fact is a "split-level" trial decision. The difference in quality one way or the other is at least debatable. A sampling of judicial review cases reversing agency decisions on substantial evidence grounds shows that the courts quite frequently vote with the trial examiner.

The gap between the trial examiner and the agency review function arises out of a conflict in the law itself and the attitude of the agency toward this problem. The function of a trial examiner is quite clear. The Act is explicit in using the words "appeal" and "review" in agency action on trial examiners decisions. The

case is taken up to the agency on a "bill of exceptions," the function of which is to review a trial decision. But this otherwise clear assignment is compromised, confused or contradicted by the provision in the same Act that the agency members have all the powers which they would have had, had the case been tried by them. This gap in some agencies has been bridged, in others it has widened into a chasm. For example, the official of one important agency on this subject stated:

> ". . . I think that the agencies now are swinging over to the opposite extreme, and that the hearing examiner's initial decision is being followed in a great, great percentage of cases.
>
> "For example, in matters involving procedure, they are practically never reversed. At the Federal Trade Commission recently, there were two contrary decisions by hearing examiners on procedural matters, and both were affirmed by the Commission, although they were opposite, on the ground that the hearing examiner was the man on the scene and should know what the correct decision should be.
>
> "In matters of decisions on the merits, more and more the hearing examiner is not being reversed unless there is the clearest kind of error. And it even goes further than this."

The conflicting point of view was expressed by an official of another agency as follows:

> "Under the statutory scheme of things the final decision is the responsibility of the Commission. In other words, we have primary responsibility, not just review responsibility."

This latter quote means that the agency members reserve the right to decide the case either way on the same record without being inhibited by the examiners decision.

There can be no doubt that the agency processing of trial examiner decisions is a prime source of delay in agency litigation. These delays are serious and they reflect adversely on the administrative process.

Meaningful information on the state of the backlog of agency cases is not available as it is in the case of court proceedings. Some statistical data in this field is contained in the 1958 Annual Report of the Office of Administrative Procedure, which became available recently. This Report states that 21 agencies disposed of 41 percent of trial examiner appeals within a three-month period. The picture conveyed by this Report indicates that on the whole there is really no delay problem in agency litigation at all.

This I submit is much too rosy a picture. I suspect that there are at least two valid criticisms of these data. In the first place it excludes from the agency review period that time required for the filing of exceptions and briefs. This in itself can consume months and to my mind it is clearly chargeable to the review function. Secondly, statistical data of this sort understandably fail to distinguish between contested cases and those which are really uncontested, but merely going through the mill. I have made a sampling of contested decisions before a number of agencies, and it is my conclusion that a fair estimate of the time devoted to the trial and decision of contested cases at the trial examiner level is one year, and that the time required for the review of a trial examiner decision in a contested case is also about one year.

What are some of the specific measures which might be considered to eliminate delays at the agency review level. We can inch our way into a few improvements, but in many instances a major reorientation of viewpoints will be necessary, both on the part of agency members and persons who have business before the agencies. I suggest consideration of a ten-point program.

1. *Eliminate Split-Level Trial Decisions.* The unnecessary time consumed in the intra-agency review phase of litigation can be totally avoided by eliminating two trial decisions at the agency level. One way would be to make the decision of the hearing officer, whether examiner or agency member, final. The world would not come to an end if this were done. It is done in the Tax Court. It was done in the early days before the agencies. The fact is that most cases are closed out at the examiner level, and a number of additional cases are carried beyond the trial examiner merely for staff processing. Public administration will be improved to the extent that agency members can avoid the ad hoc case decision treadmill and devote their time to management, policy and rule making matters.

2. *Restrict Agency Review.* The trial examiner decision could be made nearly final, if the appeal were made discretionary with the agency on certain criteria. This would retain agency discretion to review selected cases, but greatly reduce the backlog of cases at the agency review stage.

3. *Eliminate Interlocutory Appeals.* This means giving the trial examiner full control over the conduct of the hearing and eliminating altogether any interlocutory appeals. This is the worst and least justified cause of unnecessary delay and expense in agency

proceedings. This suggestion might be qualified by limiting interlocutory appeals to those which raise novel issues of law and would be dispositive of the proceeding.

4. *Discontinue Agency Review of Non-Contested Cases.* This would mean employing only initial decisions. It would eliminate all staff and agency review processing of trial examiner uncontested decisions and would greatly minimize delay and expense.

5. *Limit Bill of Exceptions.* The agency can reasonably limit the exceptions to a trial examiner decision so that only the significant matters of fact or law are presented for review. There has been a tendency to go at this task in blunderbuss fashion. Exceptions numbering in excess of a hundred are not uncommon.

6. *Confine Agency Decision to Hearing Issues Developed in the Pre-Hearing Conference.* One of the difficulties with the split-level trial decision is that a litigant cannot rely upon the agency's limiting its decision to those matters which were tried in the hearing before the trial examiner. It should not be difficult for an agency to limit its decision to those matters adjudicated in the trial. If there is need to explore some other issue or ground of decision, the case should be re-opened for a limited and expedited further proceeding. Such a procedure would contribute much in shortening agency proceedings.

7. *Discontinue the Complete Re-Write of Agency Decisions.* Since the proceedings under consideration are fully tried and decided at the examiner level, the effort should be made toward ending the litigation at that stage, and also ending any rewrite exercise thereafter. In those comparatively few cases which are appealed to the agency its decision should be addressed to the bill of exceptions. This would provide a more meaningful and integrated record and one which would reduce to a minimum the duplication between the examiner function and the agency review function. The saving in man hours and time from this procedure would be quite substantial.

8. *Agency Member Responsibility.* Among the multi-headed agencies there is sometimes a division of responsibility and in others the agency functions as a unit. The unit rule is more time-consuming. Where case congestion exists, both agencies and courts have divided their labors among divisions. This has been found effective if the division action is essentially final.

9. *Outlaw Ex Parte Activity.* Undue delays at the agency review level invite ex parte influencing and pressure. Conversely ex parte

influencing and pressure beget delays at the agency review level. Also ex parte maneuvering consumes time of agency decisional personnel. Improper ex parte activity must be outlawed for the reason that it is improper, but additionally because of the delay problem in agency litigation. Action in this area is one that probably requires legislation to be effective and this is proposed in S. 2374.

Agency staff internal influencing of decisions (excluding review staff and agency-member assistants) can be avoided and without loss of what they can contribute or violation of fair play if their views and information are presented in the open as evidence or argument through the agency's counsel.

10. *Public Information.* The best approach to a better understanding in this area would be the publication of agency organization and procedures by which the agency review function is conducted. Illumination of the dark phase of agency litigation would be a most wholesome act. It would dispel a source of much criticism which is now a matter of secrecy and mystery. If the manner of processing the review of trial examiner decisions is defensible there should be no objection to its open publication.

The above suggestions are by no means complete, but they may serve to indicate that the problem of undue delay can be approached in a variety of ways if there is a mind to do so. We may have to sacrifice the luxury of some "sacred cows." The point I wish to leave is this: The problem of undue delay and expense in agency litigation is serious. Action must be taken and I hope cooperatively by the agencies and the bar. The agencies, litigants and those practicing before the agencies should join in efforts to ascertain where unnecessary delays occur and to eliminate them. The area holding the most promise for significant gains is in the dark phase of agency litigation. We are told that probes are now underway to illuminate the dark side of the moon. There are signs that some efforts may be underway to illuminate the dark side of agency litigation. There is a Congressional interest in these matters. Also we are optimistic on the prospects of a permanent National Conference on Administrative Procedure supported by legislation and having equitable practicing bar participation on a nation-wide basis. I think there is an opportunity to make significant contributions in this area and one which the agencies themselves, on a long-term view, should now find attractive.

DISCUSSIONS WITH AGENCY STAFF REPRESENTATIVES BEFORE ADJUDICATORY HEARINGS COMMENCE

By C. Roger Nelson

I believe you will agree that there are a number of situations in which informal discussions with agency staff representatives with respect to adjudicatory proceedings are appropriate and helpful. It may be useful to look at them briefly in relation to our general subject of reducing delay.

I believe it is a mistake to carry the judicial analogy too far in this early phase of agency action. In theory, and we trust in practice, the members of the Commission or agency and not its staff make the final determination in adjudicatory proceedings. The agency staff normally has an adversary role. Even in cases where there may be only one applicant for agency action or relief and no competitor or objector appears, the staff still participates to some extent as an adversary in representing and protecting the public interest. I see no more impropriety in discussing an impending proceeding with agency staff lawyers and other representatives than in meeting with lawyers for opposing private interests before a law suit is initiated.

The judicial integrity of the agency is not compromised by such pre-hearing discussions with members of the staff. Of course I assume that the discussions with the staff are not used as a means of getting an off-the-record agency decision prior to the adjudicatory hearing. Needless to say, such discussions cannot be allowed to prejudice or foreclose the full rights upon a hearing of other interested persons. Granting these limitations, however, I believe pre-hearing discussions provide a very important and useful means of reducing or eliminating delay.

Sometimes discussion with the agency staff can be very helpful in determining the precise nature of an adjudicatory proceeding which is to be initiated by the private party. This situation arises where the applicant has a choice of administrative remedies. It plainly contributes to saving of time to establish, if possible, that the agency staff agrees that the applicant is pursuing the proper remedy.

An instance of what I am talking about is presented under the Investment Company Act of 1940. As you may know, the Securities and Exchange Commission has extensive authority under Section 6(c) of that Act to exempt persons or transactions from any or all of its provisions, subject to appropriate regard for the protection of investors and the public.

Other sections of the Act authorize the Commission to declare upon a proper showing that a company is primarily engaged in a business or businesses other than that of an investment company even though it has some investment company characteristics. Situations have been presented where a company might have some reason to believe that it could make out a case under either of the indicated routes. Since either approach would achieve the objective of relief from the requirements of the 1940 Act, it is obviously highly important to obtain, if possible, a staff reaction as to which procedure it considers the more appropriate. In such situations, the staff may be concerned as to the precedent which Commission action would create, leading it to recommend one approach rather than another.

Again, there are cases where prior consultation with agency representatives may avoid the necessity of any hearing at all before the agency issues its order. This is true, for example, in certain non-contested cases under the Public Utility Holding Company Act of 1935 and the Investment Company Act. Rule O-5 under the latter Act provides for issuing a notice that an application has been filed under the Act and giving any interested person a specified period within which to request a hearing, stating his reasons and the nature of his interest. At the expiration of such period the Commission determines whether a hearing is necessary or appropriate in the public interest or for the protection of investors. The application may well be one for exemption of a particular transaction from the Act and expected to arouse no opposition. In such a situation, the applicant would be well advised to confer at an early stage with the staff to make sure that the application filed contains all the pertinent facts and reasons necessary to justify issuance by the Commission of an order without holding a hearing.

Where it is plain that a hearing will be necessary and opposition from the staff or other interests is expected, pre-hearing discussions can nevertheless help sharpen the issues and simplify procedure. Even though pre-hearing conferences in such a situation will not

alter the staff position, they may be invaluable in providing knowledge of objections which must be overcome at the hearing if a persuasive case is to be made for the agency itself. Concentration on these critical points can be an important method of saving time.

The more numerous and complicated the prospective issues in a hearing, the greater the reason for advance discussion with the agency staff. Even the experienced agency practitioner sometimes has difficulty anticipating all of the legal issues which may be presented in a particular proceeding. In concentrating on the specific relief or other result he is seeking, he may overlook statutory or rule provisions having a less obvious bearing on the proceedings. In some cases, no amount of diligent preparation will enable counsel to foresee statutory issues which agency counsel may deem to be raised. Obviously it is desirable to learn of such points in time to deal with them in the application or other pleading and in preparing for a hearing. Costly delay can result if counsel must amend pleadings or seek continuance of hearings to develop evidence relating to issues which were not foreseen.

Implicit in what I have said is the view that agency personnel should participate freely and openly in the kind of discussions I have described. They do not compromise the public interest by full and frank exposition of their position with counsel for private parties. The federal rules of civil procedure as applied by the district courts have gone far in removing the surprise element in litigation and permitting parties intelligently to obtain information and prepare their cases for trial. Surely the staff of federal agencies should be no less alert to the desirability of simplifying and expediting proceedings by means of pre-hearing exchanges with counsel for private parties.

I have touched only lightly on some rather obvious areas in which pre-hearing discussions with agency staff representatives are appropriate and can prove helpful. I suggest that such discussions deserve more emphasis and attention from the bar and the agencies as an important means of reducing unnecessary delay in administrative proceedings.

USE OF PRE-TRIAL AS A MEANS OF OVERCOMING UNDUE AND UNNECESSARY DELAY IN ADMINISTRATIVE PROCEEDINGS

By Bernard J. Gallagher

I have divided the discussion into two phases, the first dealing with pre-trail in the regulatory agencies and the second dealing with pre-trial in adversary proceedings of a quasi-judicial character.

The regulatory agencies are agencies such as Interstate Commerce Commission, Securities and Exchange Commission, Federal Power Commission, to name a few.

The quasi-judicial proceedings are those which are carried on before Contract Appeals Boards, where the contests are, for the most part, adversary.

Because the subject of pre-trial before the regulatory agencies will be discussed by Earl Cox subsequently on this panel, as a part of his reference to the Rules of Evidence and the Federal Rules of Civil Procedure, I will make only the briefest reference to pre-trial in the regulatory agencies and devote the principal part of my allotted time to discussion of pre-trial before the quasi-judicial Boards of Contract Appeal.

As to the regulatory agencies, the effectiveness of pre-trial in shortening the proceedings and saving time depends first upon the effectiveness of a pre-trial rule and second upon the way the rule is applied both by the Hearing Examiner and by counsel for both sides. Unless counsel prepare thoroughly for pre-trial, in fact, just as thoroughly as though they were approaching trial, neither will have an understanding of the areas in which he can make stipulations of fact. Such stipulations are necessary in order to shorten the hearing time. Such stipulations also simplify the problem of briefing the case and cut down the record the Hearing Examiner has to review in reaching his decision. These measures can save time.

Turning to the matter of pre-trial before the quasi-judicial Contract Appeals Boards, we find a confusing situation. There are perhaps ten or a dozen Contract Appeals Boards in the District of Columbia. At the top of the pyramid is the Armed Services

Board of Contract Appeals in the Defense Department. In addition, agencies having Contract Appeals Boards are the Corps of Engineers, Veterans Administration, General Services Administration, the Interior Department, the Atomic Energy Commission, and others.

There is absolutely no uniformity in the procedural rules of these Boards except as between the Armed Services Board and the Corps of Engineers Board. Each of these Boards has a rule covering "pre-hearing conferences." Although such conferences are not labeled "pre-trial" they are, in practice, pre-trial. However, these rules, covering pre-hearing conferences, are only partially effective in eliminating delays. I say that they are only partially effective because it seems to me that a necessary companion of a pre-trial rule is an adequate Discovery Rule.

The Armed Services Board does have a rule covering inspection of documents. This inspection, however, is not a matter of right. An application to inspect documents is received and approved only to the extent and upon such terms as the Board in its discretion considers to be consistent with the objective of securing just and inexpensive determination of appeals without unnecessary delay. Thus even the inspection of documents which the appellant can identify is subject to approval of the Board. This leaves out of account the fact that, in the absence of an adequate Discovery Rule, an appellant in a case before a Board can suffer from the serious handicap of not knowing what pertinent documents lie in the Government's files, concerning which he has no knowledge, but which would be relevant and material evidence in the prosecution of his appeal.

The importance of discovery to litigants, and the time it saves the courts in the disposition of litigation, is emphasized by the fact that in the Rules of Civil Procedure, Section 5 of the Rules, which contains Rules 26 through 36, is devoted to depositions and discovery. Adequate discovery can only serve to facilitate the conduct of a pre-trial and facilitate the disposition of the litigation, because by resort to discovery the whole case for both sides can be fully developed.

Contract Appeals Boards have no conception of the use of the Discovery Rule as it is employed in the Federal Courts, nor do Government attorneys engaged in the defense of these contract appeals understand Discovery. Many times, during a hearing, or just prior to a hearing, appellant will become aware of the possible

existence of documents which he suspects would bear directly on the controversy, being documents in the hands of the Contracting Agency involved in the dispute. There is no Discovery Rule which allows him to explore the possible existence of these documents and he cannot describe them so as to make them the subject of a Motion to Inspect. Furthermore, he can expect no cooperation whatever from the Government attorney defending the appeal. Many of these gentlemen meet with indignant protests a request that unidentified documents be produced.

It seems to me that a Discovery Rule and an adequate Pre-Trial Rule go hand in hand. A Discovery Rule would save probing Government witnesses on cross-examination during a hearing to develop through them the existence of records or reports which might be pertinent, followed by a demand on the record during the hearing for the production of such documents for examination, coupled with the request that the hearing be recessed until the documents are produced and examined and the appellant prepares his reply thereto.

In justice to some Board members, it must be said that some of them are as determined as appellant's counsel to see that relevant documents are produced by Government counsel even though the latter resists an application for their production.

It does not seem to me, however, that the matter of discovery, or production of documents ought to be left to the discretion of the Board, or that appellants should be obliged to resort to discovery through cross-examination of Government witnesses at hearing.

The Rules of Civil Procedure in force in the Federal Courts permit any party, upon a showing of good cause, to move for the production by any other party and the inspection and copying or photographing of any designated documents, papers, books, accounts, etc., which are not privileged. Protective orders may be made so that the inspection will be done under such conditions as are reasonable.

While there are provisions for depositions in the Rules of some of the Contract Appeals Boards, these depositions are only for use *as evidence* in the appeal proceedings. There is no provision for the use of depositions to lay the ground-work for discovery, whereas under the Rules of Civil Procedure either side may call a witness for discovery without being bound by the witnesses' testimony.

To sum up, it seems to me that pre-trial, which appears to be gaining more acceptance by Contract Appeals Boards, could be an effective method of eliminating delays in these administrative proceedings, provided it is coupled with a Discovery Rule patterned after the Discovery Rule of the Rules of Civil Procedure.

I see no valid reason why uniform rules of procedure, similar to the Rules of Civil Procedure in the Federal courts, could not be put into effect in all administrative agencies, whether regulatory or those performing a quasi-judicial function.

NEEDED CRITERIA FOR DETERMINING WHAT CONSTITUTES DELAY

By John F. Cushman

Executive Assistant to the Attorney-General

Today it is generally recognized that far too many administrative proceedings are subject to excessive and unnecessary delay. While many proceedings are handled with reasonable dispatch, it is sometimes a matter of years before important regulatory, licensing, or certification proceedings finally emerge from the labyrinth of the administrative process. Yet despite this shortcoming, the surprising fact remains that there presently exist few criteria or standards for determining how long it should normally take to get final agency action on the ordinary administrative proceeding.

In my opinion, effective efforts to eliminate undue delay in the processing of cases before administrative agencies will be hampered as long as we fail to establish some recognized period of time within which the average proceeding should normally be processed in an orderly fashion. For, in the absence of some norm, who is to say whether the procedures of a particular agency are too slow.

By contrast, consider the action taken by our judicial counterparts with respect to the trial of civil cases in our State and Federal courts. The Judicial Conference of the United States has recognized six months as the time it should normally take between the time of filing and date of trial for the ordinary civil case in a Federal district court. The Attorney General's Conference on Court Congestion and Delay in Litigation has suggested for all courts that any delay beyond six months in the final disposition of the average civil action should be considered excessive. Even though this standard is currently not met in most of our State or Federal courts, at least the judges and lawyers and litigants know what the norm is—they know what is expected of them.

By the same token, it seems to me that the establishment of a similar guidepost, or even several if necessary to accommodate major differences in types of administrative proceedings, would be most helpful to practitioners and agencies alike. Obviously, merely to announce that the average administrative proceeding

should usually take about "X" months, in and of itself, is not a cure-all for excessive delay. But delays in the administration of justice, whether they be in the judicial or administrative area, have come about, in large part, by reason of public apathy, poor work habits, and just plain inertia. As the late Chief Justice Arthur Vanderbilt said, with reference to judicial delay, "It is not knowledge of ways and means that we lack; it is the will to put them into effect." But is not one of the time tested techniques for arousing necessary interest—witness our great fund raising drives—to set a goal to be reached? Unless we have some concrete idea of what is expected, will there not always be those to argue that what we have is good enough?

There is no insurmountable obstacle to establishing a recognized standard period for the processing of administrative proceedings. For example, Congress, in the Communications Act, has provided in Section 4 (e) that in order to expedite the prompt and orderly conduct of Commission business, it shall promptly report to the Congress any case which after hearing has been pending before it without decision longer than six months, stating the reasons therefor. The agencies already know, barring some unexpected development, approximately how long it takes to process a case from filing through the hearing examiner stage, and how long it ordinarily takes thereafter to dispose of an appeal to the agency. They also know whether the time normally involved is reasonable or unreasonable.

In its 1958 Annual Report, the Office of Administrative Procedure has attempted to bring together some basic statistics in this area. Concededly, these data are not sufficiently detailed to demarcate at this time what a proper average time period might be. They reflect present experience rather than the ideal. On the other hand, these figures do provide some indication of the nature of the problem involved.

For example, Table 2 shows that of the 7,505 cases pending on June 30, 1958, for which age data are available, more than one half (53%) were less than 6 months old, about one quarter (24%) were between 6 months and one year old, 13% were over 1 year but not over 2 years old, and the remaining 10% were almost evenly divided between 2 to 3 years and over 3 years old.

With respect to the 2,514 cases closed during the year by agency final decision on the merits after an examiner's decision, Table 4 discloses that 9% were disposed of within 6 months after their

commencement, 42% required from 6 months to a year, 39% were disposed of in periods of from 1 to 2 years, 6% took from 2 to 3 years, and 4% required more than 3 years.

As to the period of time required for agency review and decision after an examiner's decision, Table 6 shows that 41% of these 2,514 proceedings were decided within 3 months, and that the agency's decisional process required more than one year in 9% of the cases.

It could well be that compilation of more comprehensive statistics would show marked similarities between like procedures in different agencies from which a general pattern might be evolved. But whether or not one or more standards might be desirable, I am convinced that the necessary information upon which reasonable norms could be predicated is available. In any event, it might be noted that the 6-months' figure applicable to judicial proceedings has application to certainly as varied litigation as that heard by administrative agencies; yet this fact did not deter the judiciary from establishing a yardstick.

Last year, 21 Federal administrative agencies terminated in excess of 25,000 proceedings and the trend is continually upward. These proceedings involve important rights, privileges, and benefits which directly affect private interests and the economic strength of our nation. Every effort must be made to render the administrative process as fair and expeditious as human ingenuity can make it. There is no simple solution to the problem. But I would suggest that our common objective in seeking to eliminate unwarranted delays would be materially advanced by the development of some recognized standard or standards against which delay could be measured.

ADHERENCE TO THE RULES OF EVIDENCE AND FEDERAL RULES OF CIVIL PROCEDURE AS A MEANS OF EXPEDITING PROCEEDINGS

By J. Earl Cox

Hearing Examiner, Federal Trade Commission

Let's look at the situation as it is at the Federal Trade Commission. First, however, I hasten to state that of all the administrative agencies in the Government the Federal Trade Commission is outstandingly in the lead, in that its formal proceedings are judicial in character, the established rules of evidence are generally followed, its hearing examiners have a high degree of independence, and its efforts to find the truth and attain justice through the character of its cease-and-desist orders are irreproachable. Neither the Commissioners nor the hearing examiners are disturbed about any proposed code of ethics. They have been living under a strict moral code for many years and are engaged in a serious effort to improve the character of their formal proceedings. In fact, the Federal Trade Commission is so good that quite recently, many serious suggestions have been made that it be promoted to the status of a court. I understand that there is some proposed legislation to that effect.

These encomiums, I trust, will have an anesthetical or soporific effect upon the Honorable Commissioners who are here today, so that I may proceed with some criticisms and suggestions which I trust can be labeled constructive without subjecting me to a charge of false and deceptive practices.

At the Federal Trade Commission there is limited use of the pre-trail conference, but its true effectiveness is hampered because the Federal Trade Commission does not accept the Federal Rules relating to discovery. The objection heard is that the adoption of such rules would set up a one-way street to the advantage of respondents. The fact is not recognized—at least not admitted—that the street which would be opened would be a return passageway—the Commission's own one-way street having been established by Congress through its delegation of investigative powers to the Federal Trade Commission.

The obvious area of comparison between judicial proceedings where pre-trial and discovery are accepted practices, and administrative proceedings, where discovery does not exist and pre-trial is used only to a limited extent lies in the anti-monopoly field, where both the Federal Trade Commission and the Department of Justice may institute proceedings. The merger, Clayton Act § 7, cases are attractive for our purpose because of their current interest and close similarity. There have been 28 at the Federal Trade Commission, 21 at Justice. A tabulation of data as to all such cases is informative but too lengthy for reproduction. Reasonably valid conclusions can be reached by examining six cases, three from each source, chosen on the basis of being very long, very short and medium. The elapsed time from date of filing to date of decision and the number of hearings are shown in each instance.

F.T.C. Cases [1]	*Elapsed Time*	*Days of Hearings*
Docket 6000	6 years 8 months	266 [2]
Docket 6478	3 years 2½ months	7
Docket 6559	2 years 15 days	36 [3]
Justice Dept. Cases		
No. 10527	3 years 7 months	35 [4]
No. 4482-56	2 years 2 months	9
No. 115-328	2 years 7 days	18½

Perfunctory pre-trial conferences were held at the Federal Trade Commission in less than one-half of the cases; in all cases tried by Justice there were pre-trial proceedings accompanied by full disclosure processes. Trial records at the Federal Trade Commission were much more voluminous than those in the court cases. The data would seem to confirm the conclusions reached by Professor Davis, who, in his Treatise, said—

> "One of the supposed advantages of the administrative process is speedy disposition of controversies. But the unfortunate fact is that many administrative proceedings are slower than comparable judicial proceedings. . . . Although some types of cases are disposed of with impressive dispatch, the proposition that

[1] There are other pending merger cases at F.T.C. which have already consumed in hearings, 49, 63, 88 and 114 hearing days, respectively.

[2] In this case a first initial decision by the hearing examiner was issued after a lapse of only 1 year 6 months, but the case was remanded by the Commission.

[3] This case has been remanded by the Commission for further hearings.

[4] To submission in June, 1959.

> speed is one of the virtues of the administrative process needs qualification. . . . The process by which a trial judge hears evidence and there renders a decision is usually faster than the process by which an examiner hears evidence, submits a proposed report to which briefs and exceptions are filed, and then the agency itself hears oral argument and makes a decision." [5]

Robert A. Bicks, of the Anti-Trust Division, Department of Justice, reported that in 1956 the Department had 10 anti-trust cases—1 consumed 41 court days, another took 31 days, none of the others took in excess of 19 days.[6]

Justice cases are presented usually in one series of hearings at one place. Federal Trade Commission cases are tried at intervals in many places. An example of Federal Trade Commission procedure is shown by merger Docket 6608, in which the case-in-chief in support of the complaint was presented in 41 days of scattered hearings, held between December 10, 1956, and August 21, 1958, in 25 different cities in 19 states—from Florida to Washington, California to Connecticut, Texas to Michigan. The defense started August 5, 1959, and to the time of this chronicle, August 15, 1959, there had been 8 hearings in 3 cities in 3 different states.

I will not discuss the comparison further except to say that to a Federal Trade Commission hearing examiner it is extremely interesting and somewhat embarrassing to know that the number and the duration of the hearings in the Justice-instituted cases before the courts were surprisingly less than in Federal Trade Commission cases. There may be many reasons for this difference, but one in particular seems to be obvious. In the court hearings there was no doubt that the cases were adjudicative in nature and counsel were thoroughly familiar with the issues, the facts, the theories, and the applicable law before they went to trial. The liberal and intelligent application of the discovery rules guaranteed that result which is the *sine qua non* for an expeditious hearing.

> "In the face of . . . imprecise delineation of issues, the old 'let them go to trial and everything will come out all right' theory of litigation is about as practical as inviting a group of people to participate in an athletic event without designating whether they will be playing baseball, football, or ice hockey. The litigants are forced to wait until the contest is in progress before they can

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[5] Administrative Law Treatise, Kenneth Culp Davis, Ch. 8, § 8.08, Vol. 1, pp. 549-550.

[6] 23 FRD, June 1959, p. 426.

discover what game is being played. And if this is hard on the litigants—think of the referee." [7]

Commission cases, though based upon a formal complaint, proceed frequently upon investigational lines or are interrupted for investigational purposes. Let me quote from counsel supporting the complaint:

> "We all know that these hearings, while they are adjudicative, that at the same time they are also investigational and one reason why counsel supporting the complaint can't limit the allegations that the Commission has given him to undertake to prove is that he does not necessarily have all the facts now in his possession to know all the answers to this. . . .
>
> "The information in its files is not necessarily complete to prove all the allegations, so we do have an investigational nature to these hearings. . . ." [8]

And he wasn't fooling. Although the complaint was filed in December 1956, and 88 hearings have been held at intervals over a period of more than 2 years, the matter is *now* (August 1959) in suspense while efforts are being put forth to collect and tabulate relevant 1955 data.

Federal Trade Commission trials are at intervals—let's quote the Commission—

> "Trial of the Commission's formal complaints normally proceeds at intervals of time and place. . . ."
>
> "Having considered all of the pertinent factors, the Commission is of the opinion that the complaint in this case is not only legally sufficient, but also that the absence of further particulars therein cannot operate to deprive the respondent of a full and fair hearing. This could happen only if the respondent should be required to meet the case of counsel in support of the complaint without an opportunity to prepare. In the Commission's proceedings, where the hearings are held at intervals and the respondent is required to proceed with its defense only after completion of the case-in-chief, this cannot occur." [9]

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[7] Address by the Hon. Irving R. Kaufman, Judge of the United States District Court for the Southern District of New York, before the Federal Trial Examiners Conference, May 7, 1959, reprinted in the Congressional Record of remarks of Hon. Emanuel Celler of New York, Thursday, May 14, 1959.

[8] Counsel supporting the complaint, Federal Trade Commission Docket 6689, Tr. pp. 18-19.

[9] *Fruitvale Canning Company* case, Docket 5989, Commission's majority decision 12/9/1953 overruling hearing examiner's order granting respondent's motion for a bill of particulars filed after answer. There is a strong dissent by two Commissioners.

Again in December 1956 the Commission stated: [10]

> "Hearings in proceedings instituted by the Commission are held at intervals and the respondent is not required to proceed with its defense until after conclusion of the case-in-chief and opportunity to prepare for and meet the charges. The denial of a definite or supplementary statement concerning the matters to which the respondent's appeal relates, therefore, cannot operate to deprive it of full and fair hearing . . .".

Trials at intervals would become anachronisms if the Federal pre-trial and discovery procedures were adopted in adjudicative administrative proceedings.

In conclusion, it would seem axiomatic that if justice is to be obtained there should not be different sets of rules for different forums. That's one reason why the rules of evidence which have emerged through centuries of trial and error as the most reliable guides for the determination of facts and the accomplishment of justice should be universally relied upon by administrative agencies as by the courts. The advantages of the Discovery and Pre-trial procedures set forth in the Federal Rules have been clearly demonstrated in the courts. There should be no hesitancy about their adoption in administrative adversary adjudicative matters. The lack of such rules and procedures causes confusion, delay and unwarranted expenditures of funds in administrative cases.

The foregoing comments express my personal views and are not intended to represent or express the official views of the Federal Trade Commission.

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[10] *Fruehauf* case, Docket 6608, interlocutory order of 12/7/56 denying bill of particulars.

AUTHORITY OF HEARING EXAMINER TO CONTROL COURSE OF HEARING

By Edward T. Tait

Federal Trade Commissioner

Just as a company's organizational chart is no better than the men filling the key spots, so one cannot overlook the human factor in a critical analysis of hearing examiners. Fortunately, at the Federal Trade Commission we have been very successful with this problem. We have a career group of hearing examiners of legal ability, integrity and, generally, judicial temperament. These men will compare favorably with the judges of any court of original jurisdiction in a court of comparable size.

With such men it is appropriate merely to provide general guide lines to achieve uniformity of law enforcement. Holding too tight a grip on the reins interferes with the examiner's discretion, individual initiative and with the performance of his judicial function. The Federal Trade Commission has recognized these administrative principles. Also we have recognized the ability of our examiners. By a case-by-case series of holdings the Commission has noted the areas in which an examiner can exercise his own discretion.[1] Too great an interference with such discretion will cause uncertainty and delay.

Before mentioning some of the newer cases, let's review quickly the more obvious authority of the Federal Trade Commission hearing examiners. We are aware that oral argument is often held before the hearing examiner; that suggested findings and orders with appropriate memoranda of law may be submitted to him by the parties; and that he is required to file an initial decision. This decision, of course, is a part of the official record and includes the findings of fact, conclusions and order in addition to a detailed report on the evidence.

Further, under the Commission's present Rules of Practice, the hearing examiner not only has authority to regulate the general

[1] See remarks by Commissioner Tait, "Interlocutory Appeals," before Section of Antitrust Law, American Bar Association, Washington, D. C., April 10, 1959; also Tait, "Increasing Responsibilities of Commission Hearing Examiners," 1959 Trade Practice Annual, Washington, D. C.

course of hearings and to rule on questions of evidence but also to dispose of all other motions in cases pending before him. For instance, he is authorized to allow amendments to pleadings in the special circumstances outlined by the rules; to permit interventions in a proceeding; to take or grant the taking of depositions and to determine their scope; to issue subpoenas; and, generally speaking, to take any action with respect to trial proceedings necessary to resolving the issues presented. Noteworthy in this connection, I think, is the authority of the hearing examiner to hold conferences for purposes, inter alia, of settling or simplifying the various issues. I am glad to report that recently there has been renewed emphasis in the use of the pre-trial conference and I hope this trend will gain added momentum.

More recently the Commission has had occasion to hold that a number of specific matters, procedural and otherwise, are to be considered initially within the sound discretion of the hearing examiner. In other words, unless there is a clear showing of an abuse of discretion or prejudicial error, the examiner's rulings in such matters are not subject to interlocutory appeal. Typical rulings within this category and likewise indicative of the examiner's broadened sphere of authority during course of trial are rulings granting or denying motions for disclosure of names and addresses of prospective witnesses testifying in support of the complaint; [2] closing the case without disposing of all motions to strike evidence and modifying the usual requirement for the simultaneous filing of proposed findings; [3] granting motion to amend the complaint to conform to evidence introduced by consent of the parties,[4] and setting termination dates for the presentation of evidence.[5]

Members of the Bar will be particularly interested in the decision made by the Federal Trade Commission on July 2, 1959, in the American Metal Products case, D. 7365. Here the hearing examiner, during a pre-trial conference, directed counsel supporting the complaint to (a) mark for identification all exhibits in his possession which he intended to offer in evidence in the proceeding; (b) furnish a copy of each of such exhibits to each of respondents' counsel; (c) prepare a list of all such exhibits with a brief description thereof; and (d) deliver one copy of the list to each counsel for

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[2] Scott Paper Company, D. 6559 (1957); Gulf Oil Corporation, D. 6689 (1958); Mytinger & Casselberry, Inc., D. 6962 (1958).

[3] Luria Brothers & Company, Inc., D. 6156 (1958).

[4] Erie Sand and Gravel Company, D. 6670 (1957).

[5] Gulf Oil, supra.

respondents and two copies to the hearing examiner. The order further provided that the admission of the genuineness of each exhibit should be deemed made unless objected to within ten days of receipt. Although not contained in the terms of the formal order, the hearing examiner, as a condition for the issuance of this order, sought and received the agreement on the record of each counsel for the respondents to abide by a similar order to be later directed to them.

Upon interlocutory appeal by counsel in support of the complaint the Commission held that § 3.10 of the Commission's Rules of Practice [6] authorizes the hearing examiner to order disclosure of such exhibits. Furthermore, the Commission held that on the facts in the case the hearing examiner had not exceeded his discretion. In the past it has been recognized that the examiner, by agreement, could enter such an order. Such voluntary pre-trial, I believe, is the best and perhaps the most effective method. The American Metal Products case confirms that the examiner, if necessary, can order the same result. It will be interesting to watch the course of these pre-trial developments in administrative practice. Incidentally, an outstanding address by Judge Irving R. Kaufman, recently given before the Federal Trial Examiners Conference, should be required reading for all interested in the success of administrative proceedings.

No flat rule can be easily devised which will outline for the examiner the extent to which he should use this mandatory pre-trial authority. He should keep in mind, of course, that his function is not merely to expedite hearings. His purpose is to provide a fair and just hearing for all. Perhaps the ordering of advance disclosure of exhibits in appropriate cases should be limited by controlling the time prior to the hearing within which such disclosure should be made. In some cases the hearing examiner might order that this information should be disclosed a month

[6] § 3.10 Pre-hearing conferences. (a) The hearing examiner may, at his discretion, direct counsel for all parties to meet with him for a conference to consider: (1) Simplification of the issues; (2) Necessity or desirability of amendments to pleadings, subject, however, to the provisions of § 3.9(a)(1); (3) Stipulations, admissions of fact and of contents and authenticity of documents; (4) Limitation of the number of expert witnesses; and (5) Such other matters as may aid in the disposition of the proceeding. (b) Pre-hearing conferences, in the discretion of the hearing examiner, may be stenographically reported as provided in § 3.16(f), but shall not be public unless all parties so agree. The record shall show the matters disposed of by agreement in such pre-trial conference. The subsequent course of the proceeding shall be controlled by such action.

prior to the initial hearing. In other cases he may feel that disclosure for a few days would be sufficient. Then, too, the examiner must consider the nature and confidentiality of the information to be disclosed. Certainly if the documents involved were secured from the respondent there would be little reason to refuse their disclosure.

This ruling of the Commission is a further step in the direction of eliminating unnecessary delay in our administrative proceedings. Of course, only time will tell the extent to which our hearing examiners and counsel will avail themselves of pre-trial procedure. Counsel for respondents should be aware that this sword cuts both ways and that they, too, should expect that they will be required to disclose appropriate information at an appropriate time.

Finally, I believe that we at the Federal Trade Commission can help minimize delay by following these policies:

(1) By granting broad trial discretion to our hearing examiners;

(2) By supporting to the fullest extent the examiners' efforts to expedite proceedings;

(3) By encouraging the use of pre-trial conferences, particularly conferences narrowing the issues to be tried;

(4) By recognizing and encouraging the efforts of our Executive Director, our Bureau Directors, and others who in their day-to-day work combat problems of delay.

You and I know that respondents also must share with the Commission the burden of minimizing delay. Historically, the surest way to lose rights is to abuse them. Due process is not a static concept.

I am sure I speak for the members and staff of my Commission when I say that we are happy to have the Section of Administrative Law of the American Bar Association direct its attention and give a substantial portion of its annual meeting to the subject, "How Can Undue and Unnecessary Delay in Administrative Proceedings be Eliminated." This is a problem of constant concern to us and we sincerely welcome your suggestions. I believe that any elimination of delay will strengthen the enforcement of our laws and thereby the public's respect for them, and will, within the limits of the authority granted us, tend to strengthen our capitalistic free enterprise system.

REVIEWS

Immigration Law and Procedure. By Charles Gordon and Harry N. Rosenfield. (Albany: Matthew Bender & Company, pp. 1180.)

The authors set a threefold task for themselves in undertaking their comprehensive and definitive study of our immigration laws: (1) They sought to outline for lawyers and government officials the basic and fundamental features of the law, to point out areas of possible legal and administrative action by parties concerned, and to identify the segments of the law which may be uncertain, undecided or unsettled. (2) To assist voluntary private agencies to recognize and handle immigration problems, Messrs. Gordon and Rosenfield endeavored to illustrate the impact of immigration law on the functions and services of the private agencies. (3) The authors sought to facilitate attorney-client relationships through achieving better understanding by laymen of the kinds of problems lawyers face in immigration matters.

The authors have succeeded admirably in the implementation of their objectives. Extensive documentation, citation of precedents from immigration cases and analogous cases from other areas, and careful differentiation between "is" and "ought" in the law are among the many marks of distinction. The book is not an expression of the policy preferences of Charles Gordon and Harry Rosenfield but is, rather, a comprehensive and systematically organized analysis of court decisions, administrative rulings, statutes, treaties and other materials affecting immigration.

There is a valuable index of 75 pages that can speed the reader's access to information about matters of particular interest; a helpful table of statutory references; and an Appendix of 117 pages that contains data of practical importance for lawyers, social workers and laymen. For example, the Appendix includes tables of categories of immigrant and non-immigrant visas, which list applicable statutory provisions and citations and cross references to the sections of the text in which the particular category is discussed more fully. Another chart lists the kind and amount of administrative fines and the method of enforcement of fines for immigration law violations. Specimens of essential forms used in proceedings before government agencies and courts are included. The authors have also prepared charts of administrative organization of the Immigration and Naturalization Service and an organization chart of the Visa Office and a list of visa-issuing posts of the State Department.

Typical of the care with which the authors have sought to prevent

the reader's confusion of "ideal" policies with the realities of administrative and judicial decisions is their chapter on judicial review of administrative action. They present first an introduction to the nature and scope of judicial inquiry, then a careful and candid analysis of the functions and powers of the administrative process in the immigration field. They tell the reader bluntly that, apparently, "There is today, as there has been throughout the history of immigration enforcement, a mandate for action by immigration officers and a declaration that their decisions shall be final. Few comparable directives are found in statutes dealing with other agencies." These sections are followed by discussion of statutory provisions and administrative and judicial rulings that affect such matters as the strategy of review, the choice of proceedings for declaratory review, review in collateral proceedings and resort to *habeas corpus*. Important aspects of proceedings on review, like what constitute normal assumptions and where does burden of proof lie, are discussed with clarity and precision.

The chapter on Civil Liberties and Criminal Offenses should be especially useful for voluntary agencies and laymen, for the chapter spells out both the essentials of offenses and liabilities and the policies pursued by government agencies in construing and enforcing these provisions.

In short, Messrs. Gordon and Rosenfield have written an invaluable handbook on a subject of vast importance. It should enable the administrative law practitioner who does not specialize in immigration matters to broaden his knowledge of the field and to feel more certain about his role when immigration matters come to his attention. Teachers of administrative law will also find this study of immigration practice and procedure a stimulus to discussions about relationships between administrative due process, the requirements of the APA, and the need for agency flexibility in handling matters that affect national security. Charles Gordon, Regional Counsel for the Northwest Region of the Immigration and Naturalization Service, and Harry Rosenfield, who served as Chairman of this Section's Committee on Immigration and Nationality during 1957-58 and 1958-59, have pooled their talents and experience to give us what is bound to become the standard reference work on immigration law and procedure.

V. G. R.

MINUTES OF COUNCIL MEETING

BALMORAL HOTEL—MIAMI BEACH, FLORIDA
AUGUST 22, 23 AND 25, 1959

The meeting of the Council of the Section of Administrative Law convened at 2:30 p.m. on August 22, 1959, in the Heather Room, Balmoral Hotel, Miami Beach, following a luncheon.

Attendance: All officers and other members of the Council except Gilbert A. Cuneo, Valentine B. Deale, Frank C. Newman and Albert E. Stephan were present. In addition, approximately 40 other members of the Section, including many chairmen and vice-chairmen of committees, were present.

I. AGENDA

A tentative agenda was distributed which was approved after amendment to list specially a passport matter to be presented by the Chairman of the Committee on State Department and Foreign Commerce Matters. (A copy of the agenda is attached to the master copy of these minutes.)

II. MINUTES

Pursuant to motion of William I. Denning, seconded by Earl W. Kintner, the minutes of the 1959 Midyear Meeting of the Council were approved as distributed.

III. CODE OF AGENCY-TRIBUNAL STANDARDS OF CONDUCT

Donald C. Beelar reported on the progress of the implementation of the resolutions of the House of Delegates relative to the enactment of the Code of Agency-Tribunal Standards of Conduct. He stated that hearings on the Bill to Establish Standards of Conduct for Agency Hearing Proceedings of Record (S. 2374) and the Federal Administrative Procedure Act (S. 600) were held before the Carroll Subcommittee [1] of the Senate Judiciary Committee for

[1] Subcommittee on Administrative Practice and Procedure.

three days—July 21-23, 1959, and then recessed subject to the call of the Chairman; that representatives of the American Bar Association, among others, testified during the hearings and it is expected that the agencies will be next on call; and that while there is uncertainty as to the exact dates of the next hearings, they will perhaps be held in the fall. It was also reported that Mr. Gage, for the Section of Administrative Law, and Mr. Beelar, for the Ad Hoc Committee, met with the staff members of the Subcommittee to consider revisions in the bill and that Senator Carroll has been asked to introduce a "cleaned-up" draft, which contains certain language changes which come within the ambit of the resolution adopted by the House of Delegates in February 1959; that Congressman Walter of the Subcommittee of Administrative Law of the Judiciary Committee of the House may introduce the bill in the House; and that Oren Harris, Chairman of the Interstate and Foreign Commerce Committee of the House, has already introduced the Code of Conduct bill insofar as it concerns the six agencies within the jurisdiction of his committee (H.R. 6774).

The Chairman made reference to the recent mailing to members of the Section in connection with legislative matters and referred to Senator Dirksen's statement before the Subcommittee and on the floor of the Senate. He also referred to the influence of the "fourth branch of Government"—lobbyists—and reminded that, if the legislation passes, it must have the active support of Bar Associations and other groups.

IV. Committee Reports

1. *Securities*

C. Roger Nelson, Chairman of the Securities Committee, reported on the legislative status of the resolutions regarding Securities matters which were adopted by the House of Delegates in February 1959. He noted that the testimony is to be found in the printed report on the hearings on the bills. He expressed the view that it is doubtful whether any action will be taken during this session of Congress. The report of this committee is found at 11 Ad. Law Bull. 352-354. No recommendation was made in the report and no action was taken.

2. *Immigration and Nationality*

Chairman Gage reported that he had received a letter from Sylvester C. Smith, Chairman of the House of Delegates, in which

he expressed approval of the principles involved in the recommendations of this committee, but stated that definitive language for the legislation contemplated should be presented at the Mid-year Meeting. John W. Cragun observed that approval "in principle" has been asked for and received from the House of Delegates without definitive language, e.g., the Sellers Committee report and recommendations. He feels that the position taken in the letter from Sylvester Smith may cause trouble with all resolutions and asked whether the Chairman felt that the Section Delegate should take a position as to the necessity for drafting specific legislation. Robert M. Benjamin expressed agreement with Mr. Cragun's statement; and observed further that he thinks the position taken by Sylvester Smith is wrong. Whitney R. Harris pointed out that at least one of the resolutions of the Immigration and Nationality Committee has specific language and is ready for consideration even under the Sylvester Smith ruling. Action with respect to the Immigration and Nationality resolutions was deferred until the next day (Sunday) to afford Section Delegate John W. Cragun and Robert M. Benjamin opportunity to discuss the matter with Sylvester Smith.

On Sunday, August 23, Whitney R. Harris moved that the Council recommend to the Section that it approve the three resolutions recommended by the Committee on Immigration and Nationality (11 Ad. Law Bull. 297-298) with the proviso that language be drafted to implement Resolution No. 3. The motion was seconded by Earl W. Kintner and adopted.

3. *Mobilization*

Francis X. Brown, Chairman of the Committee on Mobilization, was not present and the Chairman of the Section commented on the committee's report, found at 11 Ad. Law Bull. 322, and emphasized the necessity for the drafting of legislation and rules in time of peace and calm rather than after a state of emergency exists.

4. *State Department and Foreign Commerce Matters*

This committee did not make a written report. Sigmund Timberg, Chairman of the committee, stated that there was no written report because (1) passport legislation is in a state of change and (2) related matters have been referred by the House of Delegates

of two Standing Committees of the Association. Mr. Timberg referred to five Senate bills: S. 1303, introduced by Senator Eastland; S. 806, introduced by Senator Humphrey and six other Senators; S. 2315, introduced by Senator Wiley; S. 2095, introduced by Senator Mundt; and S. 2287, introduced by Senator Fulbright. (No copies of these bills were furnished for the record.) He discussed in some detail the provisions of the various bills and, in summing up his appraisal of the bills, stated that he was opposed to the Eastland bill, would endorse the Fulbright bill, and considered the other three bills defective in various ways. Mr. Timberg stated that it would be useful to know the position of the Council. Mr. Benjamin pointed out that, if we take any position, the proposal under consideration would have to be in writing and presented to the Section meeting.

Mr. Cragun pointed out that an item on the House of Delegates agenda deals with the general problem and, if the Section wants to take a position in the House of Delegates, there must be action by the Section and a specific statement must be proposed and acted upon. He further observed that much of Mr. Timberg's report relates to matters outside of the Section's jurisdiction. Mr. Benjamin expressed the feeling that neither of the related matters on the agenda of the House of Delegates may be acted upon at this meeting, but that they may be referred by the House to the two Standing Committees.

Harold L. Russell expressed concern with the extent to which the Administrative Procedure Act should apply to the procedures under discussion. Mr. Russell moved that Mr. Timberg be commended for his study of the problem and that he be requested to prepare a recommendation, with appropriate resolutions, for Council and Section action. The motion was seconded by Mr. Teasdale. Earl W. Kintner observed that it would take time for the preparation of such a report, but that it is imperative that we have something in writing before consideration is given to the matter. After further discussion, Robert M. Benjamin moved that the Council authorize the Section Delegate to state to the House of Delegates that the Section of Administrative Law has under consideration the procedural aspects of various bills pending in the Congress relating to the issuance and denial of passports, and to offer the cooperation of the Section with respect to such procedural questions. The Benjamin motion was seconded by William I. Denning and duly adopted.

5. *Budget and Finance*

Herman Tocker, Chairman of the committee, referred to his report which had been distributed. (A copy of such report is attached to the master copy of these minutes.) He stated that, in connection with the $500 advance to the Chairman of the Section approved at the 1959 Midyear Meeting, $600 had actually been advanced due to a bookkeeping misunderstanding, and asked that the advance of the additional $100 be approved. Charles E. Long, Jr. moved that the additional $100 advance to the Chairman be approved and ratified. The motion was seconded by Messrs. Russell and Beelar and duly adopted.

6. *Membership*

Mark Martin, Chairman of the Membership Committee, reported on the activities of the committee during the year. He pointed out that the lists of new members of the ABA and membership lists of other organizations were used in the solicitation of memberships; that for more effective solicitation the country had been divided into 21 areas, with a committee member in each area. The membership of the Section at the time of his report was 2,025 —an all-time high.

7. *Organization and By-Laws*

Jesse E. Basquette reported for this committee, in the absence of Patricia H. Collins, its Chairman. He referred to the written report of the committee found at 11 Ad. Law Bull. 341-343 and stressed the need for continuity in Section organization. He noted the resolution relating to the project for ascertaining and defining the jurisdiction of various committees, which had been authorized but not carried out. Earl W. Kintner moved, seconded by Harold Russell, that the Council recommend to the Section approval of the recommendation of the Organization and By-Laws Committee dealing with a third meeting of the Council to be held at the conclusion of the Annual Meeting of the Section (11 Ad. Law Bull. 342). Mr. Beelar stated his agreement with the objective of the recommendation, but pointed out the provision of the By-Laws whereby failure to attend two consecutive meetings results in a vacancy on the Council and questioned the effect of the proposed recommendation upon that provision of the By-Laws.

Charles E. Smoot suggested that the problem could be met by providing that the two absences necessary to create a vacancy must be for meetings more than 10 days apart. Mr. Beelar questioned the need for the proposed revision and moved that the matter be referred back to the committee. Such motion received no second. Charles E. Long, Jr. moved that the question be recommitted to the committee for further study and report to the Council on the next day (Sunday). This motion was seconded by Mr. Beelar and duly adopted.

Jesse E. Basquette reported on Sunday on the proposed third regular meeting of the Council and the two-meeting absence rule. He suggested amendment of Section 8 of Article VI by the addition of the words "held more than 10 days apart," but observed that the third-meeting amendment may not be necessary and that how the matter is handled is immaterial to the Organization and By-Laws Committee because it was considered only at the direction of the Council. Donald C. Beelar again expressed approval of the objective, but feels that it can be done without amending the By-Laws; that the objective can be achieved by holding a session at the conclusion of the Section meeting, for consideration of Section organization and management for the ensuing year. Robert M. Benjamin pointed out that the new members do not take office until the end of the ABA meeting and that actual vote at any such meeting would have to be by outgoing Council members. After some further discussion, it was the consensus that an amendment to the By-Laws was not necessary and Chairman Gage announced that the Council would reconvene after the conclusion of the Section meeting on Tuesday, August 25.

8. *Agency Rule Making*

Raoul Berger, Chairman of the committee, referred to an article by Norman E. Futor, copies of which have been distributed for information, and expressed the view that the Agency Rule Making Committee or some other committee might well study the problem next year and make recommendations relative to the questions raised in the article.

Mr. Berger also referred to the replies by the agencies to the Dawson Questionnaire which, in his words, contain a "gold mine of raw material" and emphasized that his committee, during the past year, has merely scratched the surface; that he had considered the question of a grant for centralized study, but that, in the

meantime, individual committees should be asked to analyze and file reports with respect to the replies of the agency with which the respective committees are concerned.

Whitney Harris said he is disturbed by the failure of agencies to exercise rule-making powers and that it is a basic, fundamental problem which needs to be dealt with; that the report of the Agency Rule Making Committee is an excellent one and shows the need for definite recommendation in some areas and in other areas the matters should be referred to committees of particular competence for study and recommendation. Messrs. Berger and Harris agreed that criteria are important. Mr. Timberg questioned whether it is practical to expect assistance from State Department practitioners and expressed the view that it is something which should be done by law schools and/or by foundation grant.

Chairman Gage agreed that all practitioners cannot be expected to recommend changes and also pointed out the time limitation of specific committees. He further observed that law professors could get advice from such practitioners and that a foundation grant would be most helpful. Victor Rosenblum suggested that Mr. Timberg's remarks show that there seems to be a "little bit of Dirksen" in some practitioners. Robert McCarty observed that the "heart to heart" talk technique is effective in many instances and gives as an example discussions with the Bureau of Land Management. John Mitchell reported that his committee has a formal written statement to the effect that the Department of the Interior will not move without a "blow on the head"; and commented that law professors cannot do the job without the aid of practitioners. Mr. Berger remarked that the practitioners will aid anonymously, if necessary; and that in this "jungle" one has to have the practitioners' aid.

Whitney Harris moved the adoption of a resolution with respect to the Agency Rule Making Committee. The Harris motion was seconded by Mr. Kintner and duly adopted.[2] Robert M. Benjamin

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[2] The resolution adopted by the Council under this motion reads as follows:

"*Resolved,* That the Committee on Agency Rule Making be given the following special functions:

"(1) That the Committee is authorized,

(a) To transmit to the cognizant committees of the Section the reports heretofore prepared on rule making procedures of particular agencies,

(b) To furnish such committees with tentative conclusions of the Committee in respect to the adequacy of rule making functions of such agencies, and

(c) To cooperate with such committees in the preparation by them of final

stated that it would be most helpful to his Ad Hoc Committee on Code of Administrative Procedure to have the material developed by the Agency Rule Making Committee. Victor Rosenblum commented that Chairman Dawson of the Government Operations Committee of the House has not dropped the study.

9. *Agriculture*

The report of this committee is found at 11 Ad. Law Bull. 284. Frederic P. Lee, as Council liaison with the Committee on Agriculture, commented that, as the report indicated, the committee had not been very active during the last year.

10. *Communications*

John W. Cragun moved that consideration of the Communications Committee report go over until the afternoon session, so that Mr. Beelar could be present. The motion was seconded by Mr. Kintner and adopted. The report of this committee is found at 11 Ad. Law Bull. 285-287. No action relative thereto was taken.

11. *Food and Drugs*

The report of this committee is found at 11 Ad. Law Bull. 288-291. No action was recommended in such report and none was taken.

12. *Gas and Electric*

The report of this committee is found at 11 Ad. Law Bull. 292. No recommendation for action was made and none was taken.

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reports and definitive recommendations for the improvement of the rule making functions of such agencies, and

"(2) That the Committee continue the studies heretofore undertaken by it into such rule making functions of those agencies of the Federal Government for which no special committee now exists in the Section, with the authority to propose to the Council any specific recommendations it may have or formulate for strengthening the rule making functions of such agencies,

"(3) That the Committee recommend to the Council any specific changes which it feels should be made in the proposed administrative code in the area of rule making with the view towards submission of such recommendations as are appropriate to the Council and the Section; and if necessary, by the House of Delegates, to the Association's Special Committee on Code of Administrative Procedure."

13. *Hearing Examiners*

Fanney N. Litvin, Chairman of this committee, stated that, in addition to the report printed in the Bulletin (11 Ad. Law Bull. 293-296), she had received a letter from Congressman Brooks as she was leaving for Miami Beach, relating to Hearing Examiner matters and it would be turned over to the incoming Chairman of the committee. Everett Haycraft reported on the status of the R.I.F. problem as it relates to Hearing Examiners.

14. *Indian Matters*

The report of the Committee on Indian Matters is found at 11 Ad. Law Bull. 315-319. John W. Cragun, Council liaison with that committee, commented on the information contained in the report. He also reported that, in the revision of the Handbook of Federal Indian Law, the Department of the Interior would not entertain suggestions or comments prior to publication.

A proposed resolution submitted by the Committee on Indian Affairs subsequent to its report—relating to the up-dating and completion of "Kappler's Indian Affairs, Laws and Treaties"—was discussed. Mr. Cragun reported that, while he had grave doubts as to whether the resolution relates to an Administrative Law Section matter, the project referred to in the resolution would be useful to practitioners in the field of Indian land law. Robert M. Benjamin and Whitney R. Harris expressed opposition to the adoption of the proposed resolution. Frederic Kirgis expressed sympathy with the objective, but also questioned whether it is a matter for the Administrative Law Section; that the Section on Mineral and Natural Resources Law, particularly, is interested in the substantive law aspect; and that the matter can be brought informally to the attention of that and other Sections. John C. Farrar also expressed the belief that it is not a subject for consideration by the Administrative Law Section. Robert L. McCarty thinks it might be brought to the attention of the Secretary of the Interior. No formal motion for the adoption of the resolution was made and no action was taken relative to the matter.

15. *Natural Resources and Interior Matters*

The report of this committee is found at 11 Ad. Law Bull. 329-336. Robert L. McCarty, Chairman of the committee, high-

lighted the committee report and mentioned specifically the lack of separation of functions in the Department of the Interior in connection with some matters, a matter not discussed in the written report. Frederic L. Kirgis expressed the view that all lawyers in the field of oil and gas and public land law are interested in the problem and gave an example arising at the Public Land Management Office at Cheyenne. He also pointed out that the Executive Departments of the Federal Government have large amounts of administrative procedure; and that, while the administrative agencies have had their shortcomings, if any, pointed out in detail, the Executive Departments have not had the spotlight thrown upon them. Mr. Kirgis also observed that the cancellation of oil and gas leases is clearly adjudication. He mentioned HEW and the interest of Secretary Flemming. John J. Mitchell suggested to Mr. McCarty that his committee make a study of the Department of Interior's replies to the Dawson Questionnaire. Mr. Denning commented on the Post Office Department's disclaimer of applicability of the Administrative Procedure Act to its rule-making proceedings and expressed the belief that clarification of its rules is necessary. John C. Farrar commented that the Bureau of Indian Affairs has a procedure which it terms "appeal," but that the Administrative Procedure Act does not apply and one cannot get a record or even find out upon what the decision appealed from is based. John J. Mitchell said that what Mr. Farrar said is entirely correct and that the Department of the Interior's procedure is so bad that the reply to the Dawson Questionnaire should be pulled out and used to highlight the problem and bolster an attempt to improve the situation. Earl W. Kintner suggested use of the approach of conferring with the new solicitor and stated belief that progress can be made in such manner. Mr. Cragun agreed with the importance of the question, but suggested Section meeting for consideration.

16. *Public Contracts*

The report of this committee is found at 11 Ad. Law Bull. 344-345. The report made no recommendation and no action was taken.

17. *State Administrative Law*

Frederic L. Kirgis, Chairman of the committee, referred to the written report of the committee found at 11 Ad. Law Bull. 355-

356 and emphasized the fact that many of the lawyers in the Section are very interested in questions of State Administrative Law; and that State Administrative Law reaches more people than does Federal Administrative Law. Earl W. Kintner supported Mr. Kirgis's position and observed that many new members are vitally interested in State Administrative Law.

18. *Committee on Committees—Current*

Earl W. Kintner moved that the Council ratify the appointment by Chairman Gage of a committee on committees to advise the Section Chairmen on the make-up of committees. The motion was seconded by Mr. Beelar and adopted.

V. First Institute on Practical Problems before Federal Administrative Agencies

Chairman Gage commented on the outstanding success of the First Institute under the leadership of Gilbert Cuneo and asked for suggestions for the program for the Second Institute. Robert M. Benjamin suggested that consideration be given to participation in Regional Meetings rather than in the Institute. Donald C. Beelar expressed the view that the Institute should be continued and pointed out that the Section has continuing authority for such Institute. Earl W. Kintner reported that, as vice-chairman, he had asked Gilbert Cuneo to make tentative hotel reservations and that such reservations had been made for some time in November; that he doubts that there would be any serious conflict between the Institute and the Regional Meetings and feels we should concentrate on one Regional Meeting and the Institute. Franklin Stone reported that Gilbert Cuneo had requested views and had received a cross section of recommendations and opinions which reflected the consensus that the Institute should be continued; but he (Stone) questioned whether the timing is right because of the activities of the advisory council working with the Harris Committee. Mr. Gage pointed out that the Institute is in the nature of continuing legal education and is intended for the enlightenment of practitioners generally and not for those practicing before particular agencies only.

VI. Bibliography Project—Bibliography of Agency Practice Source Materials

The Chairman spoke briefly on this matter and reported that, while the expenditure of $500 for this project had been approved,

only $86 had thus far been expended. Frank C. Newman, who is in charge of the project, was not present at the meeting.

VII. Administrative Law Bulletin

The Chairman referred to the excellent article on the Supreme Court by the Editor-in-Chief, Victor G. Rosenblum, in the last issue of the Bulletin. Mr. Rosenblum stated that he and the board of editors had attempted to carry out the objectives of the Council in making the Bulletin a thorough, precise and up-to-date vehicle for dealing with administrative law; that he has had a high level of cooperation of committee chairmen and others; that he hopes in the future to have reviews of current articles on administrative law in other publications and also book reviews, looking toward making the Bulletin the definitive one in its field; that the next issue will be devoted primarily to the forum and talks delivered at the Miami Beach meeting. Donald C. Beelar commented favorably on the new Bulletin and also referred to the article by Leo Huard in the Spring-Summer Issue, 1959, and urged response to the "hidden" request of Huard contained therein (11 Ad. Law Bull. 214-215). Robert L. McCarty inquired about an index of the contents and binders for the Bulletin. Mr. Beelar responded that a binder can be gotten from ABA headquarters and exhibited such a binder. Mr. Rosenblum stated that a cumulative index of all past issues was made two years ago by the American Bar Foundation, but none had been made since that time.

VIII. Aviation Matters

Harold L. Russell, Council liaison with the Aviation Committee, reviewed the history of the Aviation matters which have been under consideration by the Section and Council for several years. William S. Burton, a member of the Standing Committee on Aeronautical Law of the Association, was also present. Mr. Russell moved that the Council recommend to the Section the adoption of a resolution dealing with clarification of right to judicial review of orders of the Civil Aeronautics Board and the motion was seconded by John W. Cragun. Mr. Burton, of the Standing Committee on Aeronautical Law, stated that his committee feels that judicial review should always be available and, moreover, that his committee had previously felt judicial review was already available, but that in the interest of eliminating the possibility that prejudicial procedural error of the Civil Aeronautics Board might

be shielded from judicial review, it has been agreed that legislation is desirable to cover the special considerations inherent in matters arising under Section 801 of the Federal Aviation Act. The Russell motion was adopted.[3] The second resolution covered by Mr. Russell's oral presentation is bottomed on two prior resolutions of the Section and represents a compromise position between the Section and the Standing Committee on Aeronautical Law. Mr. Russell moved that the Council recommend to the Section the adoption of the compromise resolution. The motion was seconded by Mr. Cragun and adopted.[4]

IX. Consideration of Matter of Congressional Appearances at Oral Argument

Harold L. Russell, who had asked that this matter be placed on the agenda, reported that he had since examined the minutes of the Section and found that the matter had been taken care of at the August 1958 meeting in Los Angeles. Franklin Stone stated the view that the matter of Congressional appearances should be explored searchingly.

X. Unauthorized Practice of Law by Non-Lawyers in the Federal Government

Mr. Kintner suggested that attention be given to the unauthorized practice of law by non-lawyers in the Federal Government.

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[3] The resolution approved by the Council under this motion reads as follows:

"*Resolved,* That the American Bar Association supports the enactment of legislation which will clarify rights to judicial review, in accordance with the provisions of the Administrative Procedure Act, of orders of the Civil Aeronautics Board in proceedings where decisions of the Board are subject to Presidential approval under Section 801 of the Federal Aviation Act of 1958; and

"*Resolved,* That the Aeronautical Law Committee and the Section of Administrative Law be authorized to represent the Association in furtherance of this resolution."

[4] The resolution approved by the Council under this motion reads as follows:

"*Resolved,* That the American Bar Association submit to the President of the United States the desirability of establishing or changing administrative procedures within the White House Organization which would result in (1) The earliest possible public publication of Civil Aeronautics Board recommendations to the President, and (2) disclosures, consistent with foreign policy and national defense, of the extent to which consideration has been given to business and economic factors in cases involving foreign and overseas air routes, and

"*Resolved,* That the Aeronautical Law Committee and the Section of Administrative Law be authorized to represent the Association in the furtherance of this resolution."

Mr. M. Reynolds Sands asked the Administrative Law Section to consider the establishment of a new committee on status of Government lawyers. It was the consensus of the Council, after some discussion, that the Committee on Improvement of Administrative Procedure should consider the problem during next year and that one of the problems to be given consideration is the determination of what is meant by the term "legal services."

XI. National Conference on Administrative Procedure

Ruth Smalley, as vice-chairman of the Section on Improvement of Administrative Procedure, which had proposed a resolution dealing with the establishment of a Conference on Administrative Procedure, deferred to Donald C. Beelar for the presentation of his motion relating to this subject. Mr. Beelar stated his basic objective is the same as that of the committee, but proposed a substitute resolution. He thereupon moved that the Council recommend to the Section of Administrative Law at its Annual Meeting the adoption of the substitute resolution and direction to the officers of the Section to seek a waiver so that the House of Delegates may act on the matter at this meeting. The motion was seconded by Messrs. Teasdale and Benjamin. Mr. Beelar's motion contemplates approval of the resolution adopted May 1959 by the Judicial Conference of the District of Columbia Circuit. He read the letter of Judge Prettyman relative to the subject matter and its proposed consideration by the Judicial Conference of the United States in September 1959.

Judge Charles Long asked whether there is need for legislation, except as to staff expenditures, etc., and Mr. Beelar replied that, in his opinion, legislation is necessary; that there were two different views in the District of Columbia Conference as to the need for legislation. Chairman Gage asked what effect this resolution would have on Title I of S. 600. Mr. Beelar replied that the two matters are not necessarily related. Earl W. Kintner stated that legislation is the nub of the controversy; that there is no disagreement as to the necessity for the Administrative Conference on an annual basis; that the FBA resolution called for a renewal of the President's Conference on an annual basis, but rejected the legislation idea until after study by such Conference; that there was unanimity in the Judicial Conference for the District of Columbia on the question of the need for the Conference of Administrative Law, but that there was, as had been stated, division as to the neces-

sity or desirability of legislation. Mr. Kintner stated that the FBA's view will be given to The Chief Justice; and that he personally thinks the Conference should be continued through voluntary action of the agencies.

Judge Long said his inquiry was originally made without knowledge of background and asked whether we would not get into controversy if we asked for a waiver and commented that it might be better to leave out the legislative provision. Mr. Kintner stated the view that the Midyear Meeting could consider legislative question and again endorsed the desirability of the Office of Administrative Practice and Procedure provided for in Section I of S. 600. Mr. Beelar stated that his proposal is not one to create another temporary President's Conference. Victor Rosenblum stated that a point of significance not reached in debate is that the legislation is not to tell the conference what to do or how to do it, but only to provide for organization of the Conference. Harold Russell expressed approval of Mr. Beelar's position. Earl W. Kintner moved, as a substitute motion, that the Section endorse the proposal of a Conference on Administrative Procedure to be held this year and annually thereafter and that the implementation for such Conference be referred to an appropriate committee for report and recommendation. The substitute motion received no second. Robert M. Benjamin exressed support of the Beelar resolution. Mr. Cragun expressed the view that, if the principle is correct, then legislation seems appropriate.

Mr. Cragun moved, as a substitute motion, that both the Beelar resolution and the recommendation of the Committee on Improvement of Administrative Procedure be referred to the Section without recommendation. The Cragun motion was seconded by Harold Russell and adopted.

XII. Annotation of Section Resolutions

Donald C. Beelar pointed out that the need for the compilation referred to in 11 Ad. Law Bull. 328 by Charlotte P. Murphy, vice-chairman of the National Committee, has already been done in a collation made last year under the direction of Arnold Levy, then Chairman of the National Committee; and that it is a very valuable work and one which well deserves to be printed and given general distribution.

The motion was made that the Council recess until 5 p.m. on Tuesday, August 25. Such motion was duly seconded and adopted.

XIII. Meeting of Council after Adjournment of Section Meeting

The Council reconvened at 5:15 p.m., Tuesday, August 25. The newly elected members of the Council whose terms of office commenced after the adjournment of the Association meeting on Friday, August 28, also attended the meeting.

Attendance: All present members of the Council were in attendance except Messrs. Cuneo, Deale, Newman and Stephan, who were absent during all of the Annual Meeting. Messrs. Berger, Cooper and Johnson, newly elected members of the Council, were also present.

There was general discussion of committee work and comment on the failure of some committees to function properly. Earl W. Kintner, Chairman elect, stated that the letters of appointment of committee chairmen, vice-chairmen and members will state emphatically that work is expected and that the matter will be followed up in those cases where it is needed to obtain results. It was announced that some 400 replies had been received to Chairman Gage's request for indication of committee choices and pointed out that Chairman Gage's letter, as well as the questionnaire in the lead-off sentence, emphasized that choices should be indicated only for those committees on which the member would actively participate in the work thereof.

1. *New Committees*

a. *Federal Register*

Harold L. Russell moved that a new committee dealing with the Federal Register be set up. The motion was seconded by John W. Cragun and adopted.

b. *Committee on Committees—Regular Basis*

Donald C. Beelar moved that there be established a Committee on Committees on a regular basis. The motion was seconded by Mr. Russell and adopted.

Mr. Cragun moved that the Committee on Committees be directed to make a study of the jurisdiction and duties of the various

committees and report to the Council at the Midyear Meeting. The motion was seconded by Whitney R. Harris and adopted.

2. *Committee Assignments*

Mr. Gage referred to the committee which he had informally appointed to consider the committee requests received and announced that such committee had made suggestions for committee chairmen. Mr. Kintner then read the list of suggested committee chairmen, emphasizing that it was a tentative list, and asked for comments from Council members. Numerous suggestions were received from the Council members, which Mr. Kintner assured would receive careful consideration.

3. *Institute and Regional Meeting*

Mr. Kintner commented on the Regional Meeting and the Institute on Practical Problems before Federal Administrative Agencies. He suggested that our attention and energy be devoted to the proposed Regional Meeting in Houston and to the Institute, since the program for the Memphis Regional Meeting, to be held in November 1959, has already been made up.

The meeting adjourned at 6:15 p.m.